TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 196

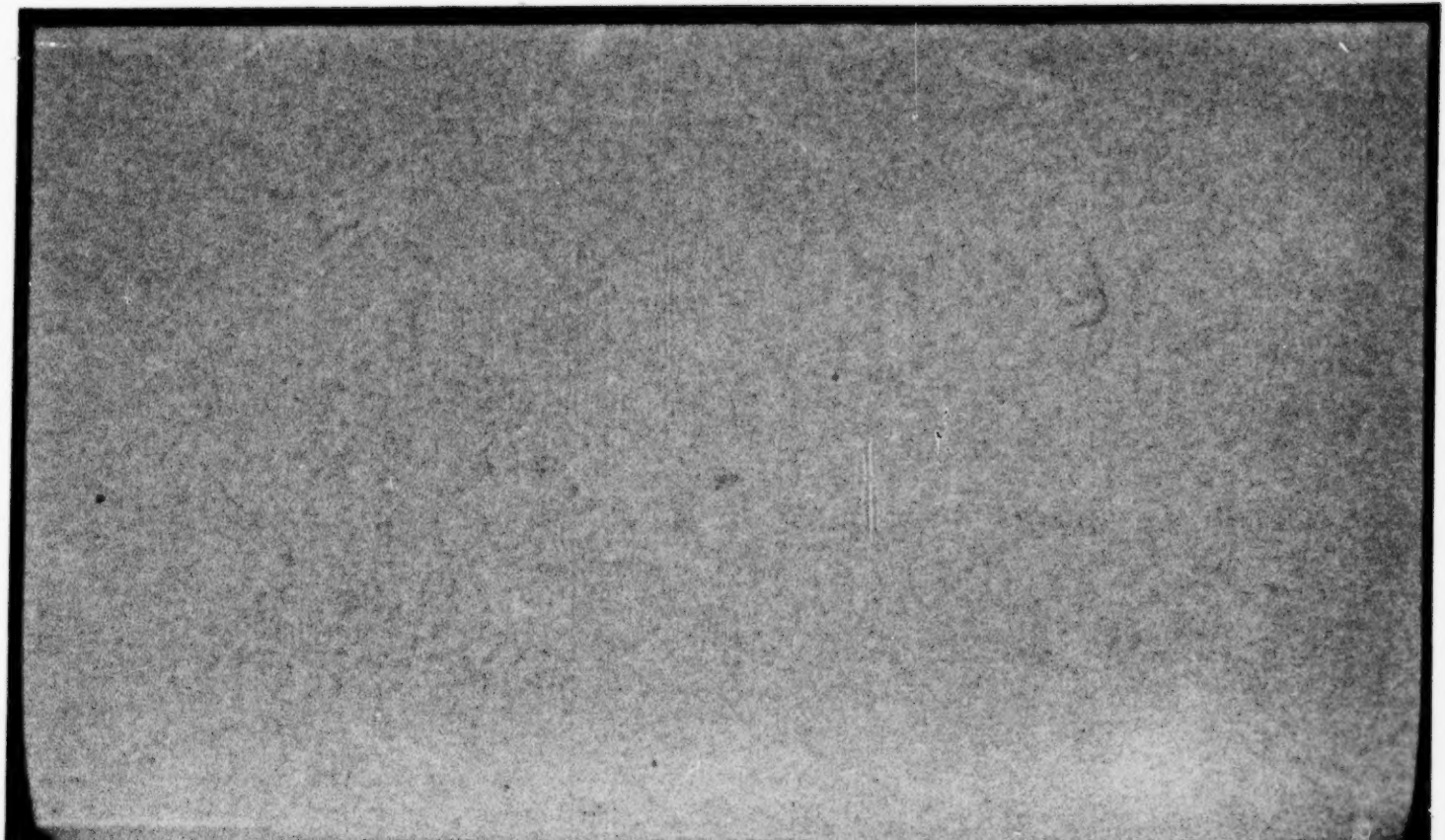
AUGUSTIN SEGUROLA AND MANUEL SANTIAGO, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

(28,647)



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IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1925

No. 1922

AGUSTIN SEGUROLA et al., Defendants, Plaintiffs in Error,

v.

UNITED STATES OF AMERICA, Defendant in Error

WRIT OF ERROR AND RETURN

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judge of the District Court of the United States for the District of Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States, plaintiff, and Agustin Segurola and Manuel Santiago, defendants, a manifest error hath happened to the great damage of the said defendants, Agustin Segurola and Manuel Santiago, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, together with this writ, so that you have the same at the City of Boston, [fol 2] Mass., on the 20th of September, 1925, in the said Circuit Court of Appeals, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, the twenty second day of July,

in the year of our Lord one thousand nine hundred and twenty five.

Antonio Aguayo, Clerk U. S. District Court for Porto Rico.

Allowed by Ira K. Wells, U. S. District Judge.

District Court of the United States, District of Porto Rico, ss.

Return of District Court on Writ of Error

And now, here, the Judge of the District Court of the United States in and for the District of Porto Rico, makes return of this writ by annexing hereto and sending herewith, under seal of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, Antonio Aguayo, clerk of the District Court of the United States for Porto Rico, have hereto set my hand and the seal of said court this sixteenth day of December, A. D. 1925.

Antonio Aguayo, Clerk District Court United States for Porto Rico. (Seal.)

[fol. 3] In United States District Court, District of Porto Rico

No. 3409, Criminal

Information—Filed in Circuit Court of Appeals December 22, 1925

The United States of America,
Judicial District of Porto Rico, ss:

In the District Court of the United States Within and for the Division and District Aforesaid at the May Term of said Court, in the Year of our Lord One Thousand Nine Hundred Twenty-five

John L. Gay, Attorney of the United States for the Judicial District of Porto Rico, who in this behalf prosecutes in the name of the United States, and for the United States, comes here into said Court on this 5th day of June, in the year of our Lord one thousand nine hundred twenty-five, in his own proper person and for the United States gives the said Court here to understand and be informed that Agustin Segurola, Manuel Santiago, late of the Division and District aforesaid, heretofore, to wit, on or about the 26th day of May, in the year of our Lord one thousand nine hundred twenty five, at Carolina, Porto Rico, in the Division and District aforesaid, and within the jurisdiction of this Court, in violation of Sec. 3 of Title II of the National Prohibition Act, did knowingly, willfully and unlawfully have in their possession, not in their private dwelling, certain intoxicating liquors, to wit, eleven (11) quart bottles of Gordon Dry Gin, forty three (43) quart bottles of Black & White Whisky, fifty six (56) quart bottles of Vermouth Cinzano, fifteen (15) half pint bottles of Brandy Hennessy, forty two (42) pint bottles of Vermouth Cinzano and twenty one (21) pint bottles of Vermouth Martini, said liquor containing one half of one per centum or more of alcohol by volume and fit for beverage purposes, con-
[fol. 4] trary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Second Count. And the United States Attorney further gives the Court to understand and be informed that the said Agustin Segurola and Manuel Santiago, heretofore, to wit, on or about the 26th day of May, 1925, at Carolina, Porto Rico, in the division and district aforesaid and within the jurisdiction of this court, in violation of Sec. 3 of Title II of the National Prohibition Act, did knowingly, willfully and unlawfully transport in a Buick Roadster No. 3908, Motor No. 1194086, on the public highways of Porto Rico, certain intoxicating liquors, to wit, eleven (11) quart bottles of Gordin Dry Gin, forty three (43) quart bottles Black and White Whisky, fifty six (56) quart bottles of Vermouth Cinzano, fifteen (15) half pint bottles of Hennessy Brandy, forty two (42) pint bottles of Vermouth Cinzano and twenty one (21) pint bottles of Vermouth Martini, said liquor containing one-half of one per centum or more of alcohol by volume and fit for beverage purposes, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

And the United States Attorney further gives the Court to understand and be informed that an affidavit was made against the defendants aforesaid before a United States Commissioner charging them with the commission of the offenses set forth in this information, a hearing held thereon and probable cause found against the said defendants, all of which is shown by the Commissioner's record on file in this Court.

Wherefore, said attorney, in behalf of the United States, prays the consideration of the Court here in the premises, and that due process of law may be awarded against the said Agustin Segurola and Manuel Santiago, in this behalf, to make answer to the United States touching and concerning the premises aforesaid.

John L. Gay, United States Attorney for the Judicial District of Porto Rico.

In United States District Court

[fol. 5] Order as Information, etc.—July 6, 1925

The defendants appeared represented by the Hon. Salvador Mestre as their attorney, and waived the reading of

the information and entered a plea of not guilty as to each of the defendants.

The Commissioner's bond is ordered continued in force and a fee of $5 charged and taxed against each defendant as provided by law. The attorney for the defendants requested that a copy of the information be furnished the defendants free of charge, which request is refused for the reason that I know of no law requiring the same. The defendants and the attorney for the defendants are free at any time to examine the information, which is now in court, and to have copies thereof made at any time, as provided by law; to which each of the defendants then and there took exception.

Done and ordered in open court, at San Juan, Porto Rico, this sixth day of July, A. D. 1925.

Ira K. Wells, Judge.

In United States District Court

Verdict—Filed July 8, 1925

We, the jury, find the defendants guilty as charged in the Information.

J. A. Bezouska, Foreman.

In United States District Court

Motion for New Trial—Filed July 13, 1925

Come now the defendants in the above entitled cause and move the court for a new trial, for the following reasons, to wit:

1. Because the defendants were not furnished, upon application for same, with a copy of the accusation against them in said cause, as provided by law, to which defendants seasonably noted an exception.

2. Because the defendants were held to answer for a [fol. 6] criminal offense in the above entitled cause and

tried thereon without due process of law, to which defendants noted an exception.

3. Because the verdict of guilty rendered by the jury in the above entitled cause at the trial of same was contrary to the law and the evidence.

4. Because the court refused to allow counsel for the defendants to cross-examine the witness for the prosecution, police officer Ceballos, as to the source of the information testified by him to have been received to the effect that the approaching automobile in which defendants were was being used at that time by defendants in transporting liquors in violation of the Federal Prohibition Law, to which refusal attorneys for defendants noted an exception.

5. Because the court admitted as evidence at the trial of said cause the liquors alleged to have been seized by the police officer Ceballos, the court having previously at the trial refused to allow the attorney for the defendant to cross-examine the said officer Ceballos as to the source of the information testified by him to have been received that the defendants were approaching Carolina in an automobile used by them in transporting at the time liquors in violation of the Federal Prohibition Law, to which defendants noted an exception.

6. Because the court admitted improper evidence at the trial against the defendants, to which defendants noted exceptions.

7. Because the court refused to admit proper evidence offered by defendants in their defense, to which refusal defendants noted exceptions.

8. Because the court allowed the United States Attorney, over the objection of the defendants' attorney, to cross examine the defendant Manuel Santiago as to matters not properly related to the direct examination, and not pertinent in any way to his defense, and to the prejudice of the said defendant, to which attorney for defendants noted an exception.

9. Because the court denied the motion of the defendants, made at the conclusion of the evidence for the prosecution,

[fol. 7] to oblige the United States Attorney to elect to proceed on the one or the other counts contained in the information, and not as to the other, to which denial the defendants noted an exception.

10. Because the defendants were placed in jeopardy and tried twice and convicted twice for the same offense.

11. And specifically as to the defendant Manuel Santiago there was insufficient evidence to justify a verdict of guilty on either count contained in the information.

Wherefore, the defendants pray that the court set aside the judgment, if same has been entered, and the verdict and grant a new trial to both defendants, or in the alternative as to the defendant Manuel Santiago.

San Juan, Porto Rico, July 11, 1925.

Salvador Mestre, E. B. Wilcox, Attorney for Defendants.

Notified with service of a copy of the foregoing motion on July 13, 1925.

John L. Gay, United States Attorney, per B. G. H.

In United States District Court

Judgment—July 21, 1925

This case comes on to be heard by the court on the motion for a new trial of the case. E. B. Wilcox, Esq., and Salvador Mestre, Esq., attorneys for the defendants, appear in behalf of the motion and Jesus A. Gonzalez, Esq., and Burton G. Henson, Esq., Assistant United States Attorney, appear in opposition thereto. The court, after hearing the respective attorneys, overrules the motion and the defendants enter an exception to the ruling of the court. Thereupon the court sentences Manuel Santiago to pay a fine to the United States of America in the sum of one hundred dollars ($100) on the first count of the information and a [fol. 8] fine of two hundred dollars ($200) on the second count of the information and to pay one half the costs of these proceedings. The court further sentences Agustin

Segurola to pay a fine of two hundred dollars ($200) on the first count of the information, three hundred dollars ($300) on the second count thereof and one half of the costs of these proceedings.

The court directs that said defendants stay committed until said fines and costs are paid.

IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed July 21, 1925

To the Honorable Ira K. Wells, Judge of said Court:

Come now Agustin Segurola and Manuel Santiago by their undersigned attorneys at law and show that on the eighth day of the month of July, A. D. 1925, at the trial of the above-entitled cause the jury found a verdict of guilty against the above named defendants, Agustin Segurola and Manuel Santiago, on both counts appearing in the information filed in the above-entitled cause; that thereafter said defendants filed a motion for a new trial in said cause which was on this date denied, and that upon said verdict final judgment against both defendants was entered on this date.

Your petitioners, feeling themselves aggrieved by said verdict and judgment as aforesaid, herewith petition the court for an order allowing them to prosecute a writ of error to the Circuit Court of Appeals of the United States for the First Circuit, sitting at Boston, Mass., under the laws of the United States made and provided.

Wherefore, premises considered, your petitioner prays for a writ of error to issue that an appeal in this behalf to the said United States Circuit Court of Appeals, for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiffs in error conditioned as the law directs and upon the giving of such bond as may be required that all further proceedings may [fol. 9] be suspended until the determination of the said writ of error by said Circuit Court of Appeals.

San Juan, Porto Rico, July 21, 1925.

Salvador Mestre, E. B. Wilcox, Attorneys for Petitioners.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF ERROR—July 21, 1925

The foregoing petition allowed upon the filing of a bond by each of the above defendants in the sum of one thousand dollars, to be approved by the clerk of this court.

San Juan, Porto Rico, July 21, 1925.

Ira K. Wells, Judge.

Received copy of the foregoing petition for a writ of error and a copy of the assignment of errors attached thereto.

San Juan, Porto Rico, July 21, 1925.

Burton G. Henson, Asst. United States Attorney.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed July 21, 1925

Come now the above named defendants, Agustin Segurola and Manuel Santiago, in the above entitled cause, and in connection with their petition for writ of error in this cause assign the following errors which defendants aver occurred at the trial thereof, and upon which they rely to reverse the judgment entered herein as appears from the record:

1. Because the defendants were not furnished, upon application for same, with a copy of the information filed against them in the above entitled cause, as provided by the Act of Congress of 1917 known as the Organic Act for Porto Rico, to which refusal defendants seasonably noted an exception.

2. Because the defendants were held to answer for a criminal offense in the above entitled cause and tried and convicted thereon without due process of law, because de- [fol. 10] fendants were not furnished with a copy of said charges.

3. Because the court refused to allow counsel for defendants to cross-examine the witness for the prosecution,

police officer Ceballos, as to the source of the information testified by him to have been received to the effect that the approaching automobile in which defendants were was being used at the time by defendants in transporting liquors in violation of the Federal Prohibition Law, to which refusal attorneys for defendants noted an exception.

4. Because the court admitted as evidence at the trial of said cause the liquors seized by the police officer Ceballos and delivered to the Federal Director of Prohibition for this prosecution, the court having previously during the trial refused the attorneys for the defendants to cross-examine the said officer Ceballos as to the source of the information testified by him to have been received that the defendants were approaching the town of Carolina in an automobile used by them at the time in transporting liquors in violation of the Federal Prohibition Law, to which defendants noted an exception.

5. Because the court allowed the United States Attorney over the objection of defendants' attorney to cross-examine the defendant Manuel Santiago as to matters not properly related to the direct examination, and not pertinent to his defense and to the prejudice of said defendant, to which attorney for defendants noted an exception.

6. Because the court denied the motion of defendants, made at the conclusion of the case for the prosecution, to oblige the United States Attorney to elect to proceed on the count charging unlawful transportation of the liquors in question or upon the count charging unlawful possession of said liquors, it being shown from the evidence of the prosecution that there was no possession of said liquors by defendants except the possession of same during the act of the transportation charged.

7. Because the defendants were placed in jeopardy twice [fols. 11-15] and tried and convicted twice for the same offense, it not appearing from the evidence of the prosecution that the defendants were in possession of the liquors described in the information at any time or place except at the time and place they were charged with having unlawfully transported same.

8. And specifically as to the defendant Manuel Santiago there was insufficient evidence to justify a conviction on either of the two counts charged in the information.

9. Because the court erred in overruling the defendants' motion for a new trial.

San Juan, Porto Rico, July 21, 1925.

Salvador Mestre, E. B. Wilcox, Attorneys for Defendants.

Supersedeas bonds on writ of error for $1,000.00 approved and filed July 21, 1925, omitted in printing.

[fol. 16] In United States District Court

Objection of the United States to Granting of Writ of Error—Filed July 22, 1925

Comes now the United States, by the United States Attorney for the District of Porto Rico, and makes objection to the granting by this Honorable Court of a writ of error to the Circuit Court of Appeals of the United States for the First Circuit in the above entitled case, and for cause therefor states the following:

1. That the first two paragraphs of the assignment of errors are ambiguous and are apt to deceive the Circuit Court of Appeals as to the true facts and actual transactions in this case.

2. That it may be inferred from the said first two paragraphs of the said assignment of errors that the defendants requested a copy of the information filed against them and they were not permitted to examine a copy in the office of the clerk of this court, or to have the same read to them, which would not be a true interpretation of the facts.

3. That it may be inferred from the said first two paragraphs of the assignment of errors that the defendants requested a copy of the said information after taking the pauper's oath, as prescribed by the Act of Congress of June 25, 1910 (see 36 Stat. at Large 866), whereas in truth

and in fact no such oath was ever filed by either of the defendants, nor was such an oath ever requested, neither did the defendants, their counsel, or either of them, tender or offer the clerk of this court at any time the fees prescribed by law for the issuance of a copy of said information by the clerk of this court, his deputies or assistants.

And because the said paragraphs of the assignment of errors are misleading, ambiguous and apt to distort the true interpretation of the transactions as had in and before the trial of the above-entitled case, the United States objects to the granting by this Honorable Court of the writ of error as prayed for by the said defendants.

Respectfully submitted,

John L. Gay, United States Attorney

[fol. 17] Copy mailed to Mr. Mestre, July 22, 1925. H. G. H.

Citation in usual form showing service on John L. Gay, omitted in printing.

[fol. 18] In United States District Court

Motion and Order for Establishment of Time, etc. Filed August 21, 1925

Comes now the appellant herein, Agustin Segurola, and unto the court respectfully shows:

1. That the time fixed by the court within which the transcript of the testimony and the record of this writ of error, allowed herein, is about to expire.

2. That due to delays unavoidable by counsel and appellant, the transcript of the testimony in narrative form has not yet been submitted for approval, but now is in the course of preparation and it will be impossible that same be approved by the court within the thirty days granted therefor by the court.

3. That after same be submitted to the District Attorney considerable time may elapse before the approval of the

court of the said transcript of testimony and the record can be secured.

Therefore, appellant prays that the time already allowed be extended for sixty days from date for the approval of the record, and that the time for filing the record in the United States Circuit Court of Appeals for the First Circuit be extended to December 15, 1925.

August 20, 1925.

(Salvador Mestre (by E. W. B.), E. B. Wilcox, Attorneys for Appellant.

Received copy of the foregoing motion on 21st of August, 1925.

Burton G. Henson, Asst. United States Attorney.

Time extended to December 15, 1925, in which to have record filed in United States Circuit Court of Appeals at Boston.

Dated at San Juan, Porto Rico, this twenty first day of August, 1925.

Ira K. Wells, Judge.

[fol. 19] In United States District Court

Notice of Submission of Transcript of Testimony. Filed August 22, 1925

Please take notice that on August 29, 1925, at 9. A.M., the appellant will move the court to approve the transcript of the record of the testimony and proceedings in the above-entitled case attached hereto.

San Juan, Porto Rico, August 22, 1925.

E. B. Wilcox, of Counsel for Appellant.

Received copy of the foregoing notice and of appellant's proposed transcript of the testimony and proceedings at the trial of said cause, on this twenty second day of August, 1925.

Jesus A. Gonzalez, Asst. United States Attorney.

Order Approving Transcript of Testimony

Now on this second day of September, 1925, the following transcript of the record of the testimony and proceedings in the above entitled case is hereby approved, there being no objections thereto.

Ira. K. Wells, Judge.

In United States District Court

Transcript of Testimony Taken at Trial on July 8, 1925

Alfonso Ceballos, District Chief of Police, Carolina, a witness for the prosecution, was duly sworn and testified on direct examination:

My name is Alfonso Ceballos; I am an officer in the insular police force, and on or about May 26th, 1925, I was the district chief of police at Carolina. I know Augustin Segurola and Manuel Santiago, who are here in court. [Pointing to defendants.] On or about May 26th, 1925, I had dealings with them in connection with a case of smuggling liquor. On that day I had information by telephone — confidential — to the effect that a Buick automobile was [fol. 20] being driven from Luquillo to Loiza, by Mr. Segurola, and then I went and got a Ford driven by Ismael Colon and went to the road between Carolina and Canovanas, and when I saw the car coming I told my driver to turn my car around in order to block the other car. It was the Buick car driven by Segurola that was coming. Segurola pushed his car to our car and we had to let him pass our car, and we chased him, not losing sight of him. When he reached the town he was going along Munoz Street and turned to Amadeo Street in the town of Carolina.

I then told my chauffeur not to follow his car but to move forward and get in his way and stop him. Then we went after him and passed him and when he tried to cut in Jose de Diego Street we were in front of his car and he had to stop. When he realized that I was in front of him he stopped his car and put it in reverse, and he had a collision with an electric post. Mr. Segurola had a collision with an electric post. Mr. Segurola was driving backwards and I was moving forward, and when he had a collision I

got out of my car and arrested him. Segurola was driving the car and Manuel Santiago was with him. I then told him to get out of the car and when they got out I found that in the back part of the car there was some liquor in Mr. Segurola's Buick car. When I took Mr. Segurola to the police station he said that I had been more fortunate than he was.

I took the liquor from the car and examined it; there was whiskey, Hennessey brandy, vermouth, brandy in small bottles and gin. I have seen those sacks before when I brought them here to the prohibition office from Carolina. I brought them from the police headquarters after they were taken from Mr. Segurola. I am sure that they are the same liquors. These two sacks are the same liquors; there were eleven sacks; the liquor was loose in the car and I put it in the sacks; these are the sacks in which I placed the liquors. I seized the liquors in loose bottles; there were 188 in all. Manuel Santiago was sitting by the side of Segurola in the car during the whole time.

[fol. 21] [The District Attorney stated to the court that the rest of the liquors were up stairs, to which statement objection was made. The District Attorney stated that in a few minutes the liquors would be brought down.]

Cross-examination by Mr. Mestre:

I know that these are the same liquors seized from Mr. Segurola because when I brought the liquor to the prohibition office they were labelled with the same labels as they now have and I recognize it as the same liquor. These labels were on the sacks; the sacks are the same; I believe that it is the same liquor because these are the kinds I took; I suppose that it is the same liquor because it is the same kind which I seized and because it is in the same sacks in which I brought it and it is so labelled. That is the only foundation that I have for believing that it is the same liquor and in the same sacks, and it is the same kind of liquor. I did not try any of the liquor or uncork any bottles and try to find out what was in it.

Q. 1. Now you have stated that you received confidential telephone information that there was a car coming with liquor, did you not?

A. Yes, sir.

Q. 2. Who gave you that information?

Mr. Gonzalez (Assistant United States Attorney): I object as they are the secrets of the police force, which should not be stated in a court of justice, and the stating of the source of such information would be against public safety.

The Court: The objection is sustained.

Mr. Mestre: I take an exception.

Examination by the Court:

Witness: I brought the liquor which I seized from this court and delivered it to the prohibition office to Mr. Fernandez Nater, an officer of the prohibition office, taking a receipt for it on May 27 in the morning. Those marked and labeled at that time.

TESTIMONY OF ISMAEL COLON, CHAUFFEUR, OF CAROLINA, P. R., A WITNESS FOR THE PROSECUTION.

[fol. 22] Direct examination:

My name is Ismael Colon. I live at Carolina, P. R. On or about May 26, 1925, I was at the plaza in Carolina. I know Chief of Police Ceballos. I am a chauffeur. On that day I was at the plaza at Carolina and Chief of Police Ceballos came to me and told me to take him to the other side of the bridge in my car.

[The United States Attorney agrees that there was not search warrant to search the automobile.]

When we crossed the bridge we saw a car coming and he told me: "Now you have to get in the way of this car and stop it." When he said "me" to refer to myself; I said "him" I refer to the chief of police. I told him that I could not do that because I was not going to destroy my car. Then the car that was coming passed us and I turned my car and we followed it. I do not know what kind of a car it was. Then we went to the town and while there we saw the other car coming and we came in its way, and the other car was moving backward and it had a collision with a post. I did not see the car at this time. I know that there was a collision because we stopped on one side of the plaza and the collision was on the other. I know there was a collision be-

cause I saw it. Yes, sir, I saw the car. I cannot say what kind of a car it was, whether a Packard or a Buick; it looked like a Packard or a Buick. When we got to the plaza, we stopped the car and the chief of police called out and went toward the car that had collided to the other car. He then took some passengers and went away,—I do not know their names.

Jose Alvarez, chauffeur, Carolina, Porto Rico, a witness for the prosecution, was thereupon duly sworn and testified as follows:

Direct examination:

My name is Jose Alvarez. I live at Carolina, I am a chauffeur; I do not know Segurola or Manuel Santiago. I know Chief of Police Ceballos of Carolina. On or about May 26, 1925, I was at Carolina and saw Chief Ceballos on that day. I was at the plaza at Carolina and saw a car [fol. 23] that had collided with a post. I went toward the car and found the chief of police opening the back of the car, taking a bottle of liquor out of it. I saw two passengers in Buick car. There were two persons in it whom I do not know. I might recognize them if I saw them. [Identifies defendants Segurola and Santiago.] I am positive that I saw these two persons in the car at that moment. The chief of police told me to take the car to headquarters and we took it there. When the chief of police told me the car had collided with the post, to take the car to headquarters, he took the two persons in another car. I did not see the liquor at headquarters. This was in the afternoon.

Cross-examination by Mr. Mestre:

My name is Jose Alvarez. I did not notice at the moment which of the two persons seated in the car was at the driver's wheel. The chief of police took some liquor from the back part of the car; I said the top of the back part of the car and took it from there. The liquor could not be seen unless the top was off.

The Court: Will you please recall the Chief of Police, Ceballos, as I would like to ask him another question?

Whereupon said witness was called and testifies as follows:

Examination by the Court:

On the date mentioned Agustin Segurola was driving the car. I seized this car because of confidential information which I received by telephone and also the manner in which Segurola acted by passing me at high speed.

Q. 1 What did he do that made you suspicious?

A. In the first place he put his car on my car and then he ran away. The confidential information that I received was that through Luquillo a car had passed driven by Agustin Segurola and containing intoxicating liquors.

Cross examination by Mr. Mestre:

I have stated that I was suspicious because he threw his car against my car and because he ran away at great speed. (fol. 24) By saying that he threw his car against mine, I mean that he tried to have a collision with my car and if it had not been for my chauffeur he would have done so.

He tried to bump his car against mine, but he had no collision because we let him pass. From his attitude he tried to bump his car on my car. The reason I had, at that time if we have not taken the precaution we took he could have bumped his car against mine. We had to let him go by and he ran away. I say he ran away because he was driving in a great speed. When his car met my car, he put it in reverse and went away and that gave me suspicion that he was driving to run away. Yes, sir, that was in town. I met him near the town, about three kilometers away. He put the car in reverse in town three kilometers from the place where I first met him. I say he tried to run away from me at the first time I met him because he tried to bump his car on mine and it was going at great speed.

No, sir, I did not order him to stop. I did not do so because we tried to make him stop by getting in his way.

Examination by United States Attorney:

I stated that Segurola's car collided with the post.

Q. 2. In your opinion if the post had been a person, could that person have avoided the collision in the same way you avoided the collision with him?

A. That is very difficult because he was going very fast.

Answers to questions by a Juryman:

This was about five o'clock in the afternoon.

I was dressed in uniform. I tried to get in his way and make him stop. Yes, sir, there are many Fords turning around on the public roads every day. Segurola should have thought I was different from any other Ford because he saw me in uniform and think he was violating the law and he run away. I know that he saw my uniform as he was going past because he passed by my side and had to see me. No, sir, I did not get out of the Ford car to make any signs to him to stop.

[fol. 25] JOHN T. BARRETT, Federal Prohibition Director, a witness for the prosecution, was thereupon duly sworn and testified as follows:

Direct examination:

My name is John T. Barrett, Federal Prohibition Director, and the liquor seized on or about May 26, 1925, in Porto Rico. I saw the liquors on or about May 26 or 27, 1925, in connection with this case. There are some sacks of liquor which came in an automobile delivered by the chief of police of Carolina. I believe he delivered them to agent Nater. I instructed Nater to have the sacks identified and stored in the storeroom in Section A. I saw agent Nater and another agent take the sacks to the storeroom, and they were stored there. I have seen these sacks before; they belong to the Segurola case. I did not take any notice of the other names; I was interested in Mr. Segurola. They appeared this morning on a court order under which I delivered them to the United States Marshal; they have been in my custody since they were delivered to me until nine o'clock this morning.

The liquor in these sacks could not have been changed. The only ones who have keys are chemist Brindle and agent

Nater. Mr. Brindle did not go over the sacks for analysis until they were in the possession of the marshal this morning, the other sacks were delivered to the United States Marshal and taken to his storeroom.

Cross-examination by Mr. Wilcox:

Yes, sir, I say these are the same sacks that were delivered to me. I have seen plenty of other sacks like these. They are common jute sacks the same that everybody uses to store liquors in. All I see are sacks that come to my office. I do not pay any attention to other sacks outside of my office. Yes, I saw other sacks of the same material and appearance in stores and trucks. The difference in the two or three sacks referred to from the common ordinary jute sacks that you see in every day use all depends upon what is packed in them. Flour or anything like that.

These sacks have no distinguishing marks themselves [fol. 26] only in regard to the contents from the time these sacks were delivered to me. They have never been touched until they were taken out by agent Nater and the marshal. I say this because the only agents who have access to the storeroom are Brindle and Nater. Nater had no occasion to touch them, and Brindle did not have occasion to go near them because they had no notice regarding them until this morning, and he was not given a bottle for analysis until they were in the custody of the marshal. Surely they could touch them, but I have full confidence in my agents. I am quite confident that these sacks have not been touched since they were stored. My confidence in the men who have access is such that I could swear under oath that they have not been touched since they were put in the storeroom. I am swearing to a thing I believe, I am swearing to what I know. It is impossible that somebody—some burglar should have made a false key to that storeroom and entered there at night and made some changes in that liquor while I was peacefully asleep.

Redirect examination by Mr. Gonzalez, Assistant United States Attorney:

The system of identification of liquors is, when liquor is delivered to my office by the police or by agents, when

the liquor is brought I insist that every man write his name on the tag. I examine the tag myself to see they are properly made. Nobody knows the difficulty I had at first over the identification of liquor. I have tried to improve on that method and I thought I had it down now. In my storeroom the locks for each of the storerooms have three keys, and there is a door lock and two padlocks, and a man cannot get in with one key or with two. The keys are in a private drawer of my safe and in order to get the keys anybody has to come to me or to the chief clerk to give them the key to open the private drawer and go to the storerooms.

Recross-examination by Mr. Wilcox:

No, sir, the chief clerk would not give the key to anyone without my knowledge.

[fol. 27] William Reinold, Jr., Federal Prohibition Agent and chemist, I have seen these bottles you showed me before. This morning Mr. Barrett gave me this bottle and told me it was from the Segurola case. I made an analysis of that bottle. It contained 46.7 alcohol per volume and is fit for beverage purpose.

Cross-examination by Mr. Wilcox:

To determine its fitness for beverage purposes, I made quite a good analysis, which included almost all of the things which might be expected to be in it.

X Q. 1. I will ask you to state, as one man to another, and under the solemnity of your oath, if you did make an analysis to determine whether or not that liquor was fit for beverage purposes? Tell the truth.

A. Yes, I made an analysis for wood alcohol.

X Q. 2. Did you make an analysis to determine whether it was fit for beverage purposes?

A. Yes.

The Court: It is the kind of whiskey as branded?

Mr. Wilcox: I object to the court——

The Court: Objection overruled.

Mr. Wilcox: I take an exception.

The Court (to Witness): Does the bottle contain whiskey?

A. Yes, sir.

Mr. Wilcox: We think these questions should come from the Government and not from the bench.

The Court: I think the court owes a duty to itself and the court to see that the facts are brought out, whichever way they turn.

Cross-examination by Mr. Wilcox:

Witness: I know it is whiskey because I tested it and smelled it, and I know it is whiskey. I am not addicted to drinking whiskey, but I have had some experience. I have been working in alcoholic liquors for about five months and can tell from the smell the kind of liquor it is. To distinguish between brandy and whiskey, brandy has some flavoring contents which give it that particular taste and flavor, and in case of this Scotch whiskey you can tell by [fol. 28] the bitter taste and smell which it has. I could smell the brandy in it anyhow. Whiskey may be made of rye, barley and corn and different grains by fermentation. I could tell whether the liquor in this bottle is brandy or whiskey by first smelling it and then tasting it. The first thing is to smell it and then to taste it. About a spoonful or less sometimes. One is made of grapes. Brandy has a particular smell and taste. It is from some flavoring contents coming from different ethers contained in the brandy and which give the taste and flavor.

X Q. 3. What is that taste and flavor?

A. Due to its different ethers.

X Q. 4. Just what is that difference?

The Court: I do not think a man could describe it. I can tell the difference and have no doubt that you can and that the jury can but as to describing it, I do not think that any man could describe it. How can you describe the difference between two flowers? It is something which is a fact but which cannot be described.

Witness: Yes, sir, I made an analysis of the contents of that bottle. I know what the contents are now. I know it is what I put on that tag. I do not know what it was on May 26, 1925. I do not know who put that liquor in that bottle.

X Q. 5. Do you of your own knowledge know where that bottle came from?

The Court: He stated that Mr. Barrett gave — to him for analysis and that is all he knew of it.

Witness: I have never told what kind of analysis I do. I make four different tests, or six, to determine whether it is fit for beverage purposes. I always make six tests for an analysis and they included tests for wood alcohol, for all metallic substances, all alcaloids, and for all substances precipitated, a test of smell, a test for taste, and by all these tests I do not think there is anything that the liquor could contain that would escape the analysis. I made all these tests on this occasion that I took about an hour later. To test wood alcohol I made a formaldehyde test. I have [fol. 29] to oxidize the contents, first to take some of the contents so I know what passes over is wood alcohol, and then with that for a basis I oxidize, after distilling. I first distill some of the contents, then oxidize with sulphuric acid and then I made a second oxidization of oxalic acid, so I am sure if it has wood alcohol and if it is then stirred up it will produce a dark violet color when alcaloids are dropped in. Surely I drop in some alcaloids.

[The witness continued a further technical explanation of the analysis made which it is agreed is unnecessary to reproduce in the record.]

Re-examination by the United States Attorney:

When Mr. Barrett gave me this bottle it was closed. I tasted this whiskey. I have no pains or ill feeling now. Any whiskey which is made by appointment to the King and the Prince of Wales is a good whiskey.

The whiskey is offered in evidence and objection was made on the ground that it had not been [illegible] identified. The objection was overruled and the defendant took an exception, and therefore the whiskey was admitted in evidence and marked "Exhibit A" for the prosecution.

The jury excused, Mr. Mestre made the following motion:

Mr. Mestre: Our motion is to suppress the liquors in this case because the District Attorney admitted that the chief of police did not have a search warrant to search the automobile, because the chief of police testified that he searched

this automobile on account of confidential telephone information and that he was precluded by the District Attorney from stating who gave that information. That according to law a telephone conversation without identifying the party who made the statement amounts to an anonymous information and is not according to law sufficient to entitle the chief of police or any other officer to search an automobile, as was done in this case. We respectfully beg the court to suppress the liquors as evidence in this case and not to allow it to go to the jury as part of the evidence in the present case.

[fol. 30] The Court: In this case the chief of police who made this seizure has testified to the effect that he received confidential information that this defendant in his car would pass through Carolina on the day on which the seizure was made with liquor in his car, and that in accordance with this confidentially made information he was on the watchout for the defendant; that he saw the defendants in the car and tried to place himself in front of the car so that the defendant would have to stop and that the defendant tried to run into him and finally ran away and proceeded until overtaken, that after that he came up to the defendant and stopped him and searched his car. I am satisfied that this chief of police had a right, by reason of the confidential information received by him and by reason of the suspicious actions of the defendant, to believe that a law was being violated and to search the car, and it is my opinion that the search of this car was legal, and the motion will be overruled.

To which the defense then and there duly excepted.

Mr. Mestre: I would also like to bring up again in order to get it in the record the objection we made at the arraignment on the ground that the defendants have not been furnished with a free copy of the information, and that we objected to going to trial on that ground.

The Court: The objection is overruled for the reason that at the time that the defendants pleaded to the information, the information was in court and open to their inspection, and the defendants and their attorneys were informed by the court that they were at perfect liberty to examine said information in any way they desired or at perfect liberty to make copies thereof or to order the copies to be

made and certified to by the clerk upon the payment of the fee as provided by law and the defendants and their attorneys have had every means of acquainting themselves with the contents of the information. The motion is overruled.

Mr. Mestre: We take an exception.

Whereupon MANUEL SANTIAGO, defendant, was called as a [fol. 31] witness for the defense and after being duly sworn testified as follows:

Direct examination by Mr. Mestre:

My name is Manuel Santiago. I do any kind of work and I live at Puerta de Tierra. On the twenty sixth of May, 1925, in the afternoon, I was at Fajardo. On that day I met Mr. Segurola and he told me he was coming to San Juan and asked me if I wanted to come with him and I said yes, and came with him. I asked him to bring me over.

The Court: You asked him?

A. Yes, sir, I did.

I took no part in loading any liquor in the car. I did not know there was any liquor in the car for I saw none. I do not know how to drive a car.

Q. 1. Could that car bring anything inside of the back part of it without a passenger seeing it?

A. I do not think so.

Q. 2. You don't understand my question.

The Court: He might have understood it.

Witness: I saw no liquor in the car, which was a two passenger car. Behind the two seats was a box which was closed. A passenger could not see the contents of that closed box. I do not know what it contained. I did not look into that box. I did not know that the car was bringing any liquor. I was not the owner or in possession of any liquor on that day. I have no business with Segurola on that day. I came with him because I wanted to come to San Juan and all I did was to ask Segurola to bring me to San Juan—get in the car and come in with him.

Cross-examination by United States Attorney:

I work at any place where I find work. I work at a pier. I work anywhere. It is about a year ago since I left the pier. I am engaged in many kinds of businesses, among them is buying fowls for the market, which I bring to sell at the market from the country. At Rio Piedras. On that day I was at Fajardo for pleasure. I do not remember whether it was Sunday or Monday. I was there for pleasure. I went there because I wish to be there but [fol. 32] have not been there before. I went along in a Ford, whose owner I do not know and paid him a dollar and a half for the trip. I did not go that day. I stayed in Fajardo two days. I slept in the house of a woman of the street.

X Q. 3. Was the woman in a relation to you?

Mr. Mestre: I object to the question, which has no relation to the case.

The Court: They have the right to know what he was in Fajardo for.

Mr. Mestre: But not to go into this detail.

The Court: It tends to bring out what kind of a man he is. He is your witness.

Mr. Mestre: But on a cross-examination he must confine himself to the direct examination.

The Court: You brought out that he went to Fajardo and asked the other defendant for a ride and they have a right to know why he was in Fajardo.

Mr. Mestre: But not what relations he had with a certain woman.

The Court: I think they have a right to know whether he is lying or telling the truth. They may be prepared to prove he was not in Fajardo, I do not know, but they certainly have a right to know.

Witness: I went to the house and met her. There are people who know this kind of woman and I went to one and asked where I could find one. This was at night. During the day I was just taking a walk around town. The next day I did the same thing as I was there for pleasure. I met the woman again. I met her twice. I don't recall the hour that I saw Mr. Segurola in Fajardo. I don't know whether it was in the afternoon. I have no watch.

I know that this affair between the police and Segurola happened in the afternoon because I noticed that it was in the afternoon. I did not notice what part of the day it was when I met Segurola. I paid the chauffeur one dollar and a half to take me to Fajardo. Nothing happened after I [fol. 33] left. I have known Segurola a long time. I talked with him on the way. I do not know Segurola's occupation. He is not an intimate friend. I just know him; also about four or five years but I don't know his occupation.

Yes, the police arrested us both and took us to the police headquarters. I don't know if the police found liquor in the car. I only know that we were taken to the police headquarters. He did not tell me why. I did not see the car being opened. I asked the chief why he took me to headquarters and he answered me: "Come with me." He took me inside and I sat there.

A Juryman: Where did you first see Segurola in Fajardo?

A. In the town on the street. I think it is a two seated car because there were two persons in it. I don't know whether it was a touring car or a runabout. The police did not tell me the cause of my arrest. He did not let me go, he took me to the headquarters. I don't know who filed the bond.

The Court: When did you first learn what you were arrested for?

A. After the chief of police took many sacks upstairs, he said they contained liquor. I don't know where he got them from. He took them upstairs. It was the police headquarters and he took me inside from outside. I did not see the chief of police search the car. When I first saw Segurola he was in his car at Fajardo. It was moving and I asked him to stop, which he did and took me out. I don't know what part of Fajardo this was. I don't know the streets. When the police stopped us and arrested us at Carolina, we were at the plaza. The car had a collision with a post, striking its fender at the back part. Yes, we were going backward. When the car collided we stopped and the chief of police came to us and opened the car and told us to go to headquarters. That was all I did. I was standing there and asking why he took me to headquarters. I don't know who

brought the car to headquarters. When we were coming from Luquillo, I did not see the chief of police in a Ford at the bridge nor any police officer putting up his hands to [fol. 34] stop the car or making any signal of any kind. The police chief came and opened the back part of the car and told us to go to headquarters and the car was stopped there and I was on the outside near the car. About five minutes after the collision the police came to my side.

Alfonso Ortalles, Chief of Police, recalled by United States Attorney and testified as follows:

When I came close to the car Segurola was driving and after the collision they were inside the car, and that I am positive they got out when I told them to. After I told him to get out I sent the liquor with a chauffeur to headquarters and I took the defendants to headquarters; Santiago was there and saw everything that happened. I told him I arrested him because he was transporting liquor and Santiago arrived at the same time. They saw the liquor and I counted it before Segurola; Santiago was in the adjoining room. When I opened the car at the plaza Santiago was there.

Cross-examination by Mr. Mestre:

Yes, I testified that Santiago saw the whole transaction at the moment he was arrested. At that moment I arrested them and sent the liquor to headquarters; that was all he saw at that moment. When the car collided I went to them and arrested them immediately. Their car was moving backward and we were moving forward. At the moment of the collision I was in front of them. Yes, I met the car about three kilometers from Carolina; it was going very fast and I was going in a Ford and they were only a little ahead of me. Yes, they were going fast and in a faster car than mine, but they had some obstacles in the way and had to reduce speed.

Mr. Wilcox: I desire to make a motion at this time.

The Court: The jury will be excused until two o'clock this afternoon.

Mr. Wilcox: Counsel for the defendants move the court to direct the prosecution to elect between further prosecution of this cause as between the first and second counts [fol. 35] thereof. That is to say, that the Government be forced to elect whether or not they will prosecute these defendants for possession of the liquors charged to have been found in their possession or upon the charge of transportation, for it appears from the theory of the prosecution's case as shown by the evidence that the possession with which the defendants are charged in the first count is necessarily included in the transportation as charged in the second count; for it appears from the evidence that the possession and transportation refers to the same liquor and to the same dates and are identical acts. I hope I have made that clear but I will make it clearer in argument.

Whereupon the hearing was adjourned until 1.30 o'clock P. M. on July 8, 1925, at which hour the court reconvened, in the presence of the accused and their counsel, and the following proceedings were had:

Following argument by counsel on the motion of Mr. Wilcox:

The Court: The motion is overruled.

Mr. Wilcox: I take an exception. I now request that the court give the following instructions to the jury.

In United States District Court

Praecipe for Transcript of Record. Filed August 26, 1925

To the Clerk:

Please include in the transcript of the record for the use of the United States Circuit Court of Appeals for the First Circuit certified copies of the following documents, papers and orders of the above-entitled case:

1. The information.

2. The motion of the defendant for a copy of the information, and court's action or order on said motion or request.

3. The verdict of the jury.

4. The motion for a new trial, and the court's order on said motion.

5. The sentence of the court.

[fol. 36] 6. The defendant's petition for a writ of error, the assignment of errors, and the allowance thereof.

7. The defendant's bond and the approval thereof.

8. The motion of the United States Attorney opposing the allowance of the petition of the writ of error.

9. The citation on the writ of error, and the return thereon.

10. The transcript of the evidence and proceedings taken and had at the trial.

11. The order of the court allowing until December 15, 1925, for filing the record in the office of the clerk of the United States Circuit Court of Appeals, including the motion for the extension of time.

12. Defendant's praecipe for the record.

Salvador Mestre, of Counsel for Defendant.

Received a copy of the foregoing on this the twenty-fifth day of August, 1925.

John L. Gay, United States Attorney.

In United States District Court

Order Extending Time—October 31, 1925

The motion filed by the defendant for the extension of the May, 1925, Term into the November, 1925 Term is granted by the court and it is so ordered.

In United States District Court

Bill of Exceptions—Filed December 2, 1925

Caption

Be it remembered that on the eighth day of July, A. D. 1925, being the May Term of the court of 1925, the above-entitled cause came on for trial by jury, the Hon. Ira K.

Wells, Judge, presiding. The United States was represented by Mr. Gonzalez, Assistant United States Attorney, and the defendants by Salvador Mestre, Esq., and E. B. [fol. 37] Wilcox, Esq., and thereupon the following proceedings were had and the following constitutes the action of the court in connection with said proceedings, as to which errors have been assigned by the above named defendants:

(1) Because the defendants were not furnished upon application for same with a copy of the information filed against them in the above entitled cause, as provided by the Act of Congress of 1917 known as the Organic Act for Porto Rico, to which refusal defendants seasonably noted an exception.

On the day of the arraignment the attorney for the defendants made a motion requesting that a copy of the information be furnished the defendants free of charge, which said motion was denied by the court, to which an exception was taken.

(2) Because the defendants were held to answer for a criminal offense in the above entitled cause and tried and convicted thereon without due process of law, because defendants were not furnished with a copy of said charges. And in support of this assignment defendants rely upon the denial of the motion for a copy of the information and the exception taken, and the provisions of the Act of Congress of 1917, known as the Organic Act for Porto Rico.

(3) Because the court refused to allow counsel for defendants to cross-examine the witness for the prosecution, police officer Ceballos, as to the source of the information testified by him to have been received to the effect that the approaching automobile in which defendants were was being used at the time by defendants in transporting liquors in violation of the Federal Prohibition Law, to which refusal attorneys for defendants noted an exception.

The witness Ceballos for the prosecution testified as follows:

"My name is Alfonso Ceballos; I am an officer in the insular police force, and on or about May 26, 1925, I was the district chief of police at Carolina. I know Agustin Segu-

rola and Manuel Santiago who are here in court. [Pointing to defendants.] On or about May 26, 1925, I had dealings with them in connection with a case of smuggling liquors. On that day I had information by telephone confol. 38] fidential to the effect that a Buick automobile was being driven from Luquillo to Loiza, by Mr. Segurola, and then I went and got a Ford driven by Ismael Colon and went to the road between Carolina and Canovanas, and when I saw the car coming I told my driver to turn my car around in order to block the other car. It was the Buick car driven by Segurola that was coming. Segurola pushed his car to our car and we had to let him pass our car, and we chased him, not losing sight of him. When he reached the town he was going along Munoz Rivera Street and turned to Amadeo Street, in the town of Carolina. I then told my chauffeur not to follow his car but to move forward and get in his way and stop him. Then we went after him and passed him and when he tried to cut in Jose de Diego Street, we were in front of his car and he had to stop. When he realized that I was in front of him he stopped his car and put it in reverse, and he had a collision with an electric post. Mr. Segurola had a collision with an electric post. Mr. Segurola was driving backwards and I was moving forward, and when he had a collision I got out of my car and arrested him. I then told him to get out of the car and when he got out I found that in the back part of the car that there was some liquor in Mr. Segurola's Buick car. When I took Mr. Segurola to the police station he said that I had been more fortunate than he was. I took liquor from the car, and examined it; there was whiskey, Hennessey brandy, vermouth, brandy in small bottles and gin. I have seen those sacks before when I brought them here to the prohibition office from Carolina. I brought them from the police headquarters after they were taken from Mr. Segurola. I am sure that they are the same liquors. These two sacks are the same liquors; there were eleven sacks; these are the sacks in which I placed the liquors. I seized the liquors in loose bottles, there were 188 in all. Manuel Santiago was sitting by the side of Segurola in the car during the whole time.

[The District Attorney stated to the court that the rest of the liquors were upstairs, to which statement objection

[fol. 39] was made, the District Attorney stating that in a few minutes the liquors would be brought down.]

Cross-examination by Mr. Mestre:

I know that these are the same liquors seized from Mr. Segurola because when I brought the liquor to the prohibition office they were labelled with the same labels as they now have and I recognize it as the same liquor. These labels were on the sacks; the sacks are the same; I believe that it is the same liquor because these are the kinds I took. I suppose that it is the same liquor because it is the same kind which I seized and because it is in the same sacks in which I brought it and it is so labeled. That is the only foundation that I have for believing that it is the same liquor and in the same sacks, and it is the same kind of liquor. I did not try any of the liquor or uncork any bottles and try to find out what it was.

X Q. 1. Now you have stated that you received confidential telephone information that there was a car coming with liquor, did you not?

A. Yes, sir.

X Q. 2. Who gave you that information?

Mr. Gonzalez (Assistant United States Attorney): I object as they are the secrets of the police force, which should not be stated in a court of justice, and the stating of the source of such information would be against public policy.

The Court: The objection is sustained.

Mr. Mestre: I take an exception.

Examination by the Court:

Witness: I brought the liquor which I seized from this court and delivered it to the prohibition office to Mr. Fernandez Nater, an officer of the prohibition office, taking a receipt for it on May 27 in the morning. Those marked and labeled at that time."

(4) Because the court admitted as evidence at the trial of said cause the liquors seized by the police officer Ceballos and delivered to the Federal Director of Prohibition for this prosecution, the court having previously during the [fol. 40] trial refused the attorneys for the defendants to

cross-examine the said officer Ceballos as to the source of the information testified by him to have been received that the defendants were approaching the town of Carolina in an automobile used by them at the time in transporting liquors in violation of the Federal Prohibition Law, to which defendants noted an exception.

In support of this assignment reference is made to the testimony of the policeman Ceballos especially in reference to the court's refusal to allow the officer to be cross-examined as to the source of his information that defendants were transporting liquor, and the testimony of John T. Barrett and William Brindle, whose testimony appears in the transcript of the testimony in narrative form approved by the court on the second day of September, 1925.

It is urged that the liquors were improperly admitted as evidence because they were seized without a search warrant, and in violation of the fourth and fifth amendments of the Constitution of the United States, re-enacted by Congress in the act of 1917 known as the Organic Act for Porto Rico. It is further asserted that the court erred in the course of the defendants's cross-examination of William Brindle in regard to the contents of certain bottles offered and admitted in evidence, wherein the following occurred:

"William Brindle, Jr., Federal Prohibition Agent and chemist: I have seen these bottles you showed me before. This morning Mr. Barrett gave me this bottle and told me it was from the Segurola case. I made an analysis of that bottle. It contained 46.7 alcohol per volume and is fit for beverage purposes.

Cross-examination by Mr. Wilcox:

To determine its fitness for beverage purposes, I made quite a good analysis which included almost all of the things which might be expected to be in it.

X Q 1. I will ask you to state, as one man to another, and under the solemnity of your oath, if you did make an analysis to determine whether or not that liquor was fit [fol. 41] for beverage purposes. Tell the truth.

A. Yes, I made an analysis for wood alcohol.

X Q 2. Did you make an analysis to determine whether it was fit for beverage purposes?

A. Yes.

The Court: It is the kind of whiskey as branded?

Mr. Wilcox: I object to the court——
The Court: Objection overruled.
Mr. Wilcox: I take an exception.

The Court (to witness): Does the bottle contain whiskey?
A. Yes, sir.

Mr. Wilcox: We think these questions should come from the Government and not from the bench.
The Court: I think the court owes a duty to itself and the court to see that the facts are brought out, which ever way they turn.

Cross-examination by Mr. Wilcox:

Witness: I know it is whiskey because I tested it and smelled it, and I know it is whiskey. I am not addicted to drinking whiskey, but I have had some experience. I have been working in alcoholic liquors for about five months and can tell from the smell the kind of liquor it is. To distinguish between brandy and whiskey, brandy has some flavoring contents which give it that particular taste and flavor, and in case of this Scotch whiskey you can tell by the bitter taste and smell which it has. I could smell the brandy in it anyhow. Whiskey may be made of rye, barley and corn and different grains by fermentation. I could tell whether the liquor in this bottle is brandy or whiskey by first smelling it and then tasting it. The first thing is to smell it and then to taste it. About a spoonful or less sometimes. One is made of grapes. Brandy has a particular smell and taste. It is from some flavoring contents coming from different ethers contained in the brandy and which give the taste and flavor.

X Q. 3. What is that taste and flavor?
A. Due to its different ethers.
[fol. 42] X Q. 4. Just what is that difference?

The Court: I do not think a man could describe it. I can tell the difference and have no doubt that you can and that the jury can, but as to describing it, I do not think that any man could describe it. How can you describe the difference between two flowers? It is something which is a fact but which cannot be described.

Witness: Yes, sir, I made an analysis of the contents of that bottle. I know what the contents are now. I know it is what I put on that tag. I do not know what it was on May 26, 1925. I do not know who put that liquor in that bottle.

Q. Do you of your own knowledge, know where that bottle came from?

The Court: He stated that Mr. Barrett gave it to him for analysis and that is all he knows of it.

Witness: I have never told what kind of analysis I do. I make four different tests or six to determine whether it is fit for beverage purposes. I always make six tests for an analysis and they included test for wood alcohol, for all metallic substances, all alcoloids, and for all substances precipitated, a test of smell, a test for taste, and by all these tests I do not think there is anything that the liquid could contain that would escape the analysis. I made all these tests on this occasion that I took about an hour. To test wood alcohol, I made a formaldehyde test. I have to oxidize the contents, first to take some of the contents so I know what passes over is wood alcohol, and then with that for a basis I oxidize, after distilling. I first distill some of the contents. Then oxidize with sulphuric acid and then I made a second oxidization of oxalic acid, so I am sure if it has wood alcohol and if it is then stirred up it will produce a dark violet color, when alcoloids are dropped in. Surely I drop in some alcoloids.

[The witness continued a further technical explanation of the analysis made which it is agreed is unnecessary to reproduce in the record.]

[fol. 43] Re-examination by the United States Attorney:

When Mr. Barrett gave me this bottle it was closed. I tasted this whiskey. I have no pains of ill-feeling now. Any whiskey which is made by appointment to the king and the Prince of Wales is a good whiskey. The whiskey is offered in evidence and objection was made on the ground that it had not been properly identified. The objection was overruled and the defendants take an exception and therefore the whiskey was admitted in evidence and marked "Exhibit A" for the prosecution.

The jury excused, Mr. Mestre made the following motion:

Mr. Mestre: Our motion is to suppress the liquors in this case because the District Attorney admitted that the chief of police did not have a search warrant to search the automobile, because the chief of police testified that he searched this automobile on account of confidential telephone information and that he was precluded by the District Attorney from stating who gave that information. That according to law a telephone conversation without identifying the party who made the statement amounts to an anonymous information and is not according to law sufficient to entitle the chief of police or any other officer to search an automobile, as was done in this case. We respectfully beg the court to suppress the liquors as evidence in this case and not to allow it to go to the jury as part of the evidence in the present case.

The Court: In this case the chief of police who made this seizure has testified to the effect that he received confidential information that this defendant, in his car, would pass through Carolina on the day on which the seizure was made, with liquor in his car, and that in accordance with this confidentially made information he was on the watch out for the defendant; that he saw the defendants in the car and tried to place himself in front of the car so that the defendant would have to stop and that the defendant tried to run into him and finally ran away and proceeded until overtaken; that afterwards he came up to the defendant and [fol. 44] stopped him and searched his car. I am satisfied that this chief of police had a right, by reason of the confidential information received by him and by reason *the* the suspicious actions of the defendant, to believe that a law was being violated and to search the car, and it is my opinion that the search of this car was legal, and the motion will be overruled.

To which the defense then and there duly excepted.

Mr. Mestre: I would also like to bring up again in order to get it in the record the objection we made at the arraignment on the ground that the defendants have not been furnished with a free copy of the information, and that we objected to going to trial on that ground.

The Court: The objection is overruled for the reason that at the time the defendants plead to the informa-

tion, the information was in court and open to their inspection, and the defendants and their attorneys were informed by the court that they were at perfect liberty to examine said information in any way they desired or at perfect liberty to make copies thereof or to order the copies to be made and certified to by the clerk upon the payment of the fee as provided by law and the defendants and their attorneys have had every means of acquainting themselves with the contents of the information. The motion is overruled.

Mr. Mestre: We take an exception."

(5) Because the court allowed the United States Attorney, over the objection of defendants' attorney, to cross-examine the defendant, Manuel Santiago, as to matters not properly related to the direct examination, and not pertinent to his defense, and to the prejudice of said defendant, to which attorney for defendant noted an exception.

The following is the substance of the testimony and cross-examination of the defendant MANUEL SANTIAGO and proceeding in connection therewith:

"My name is Manuel Santiago. I do any kind of work and I live at Puerta de Tierra. On the 26th of May, 1925, in the afternoon, I was at Fajardo. On that day I met Mr Segurola and he told he was coming to San Juan and asked [fol. 45] me if I wanted to come with him and I said yes, and came with him. I asked him to bring me over.

The Court: You asked him?

A. Yes, sir.

I took no part in loading any liquor in the car. I did not know there was any liquor in the car for I saw none. I do not know how to drive a car.

Q. 1. Could that car bring anything inside of the back part of it without a passenger seeing it?

A. I do not think so.

Q. 2. You don't understand my question.

The Court: He might have understood it.

A. I saw no liquor in the car which was a two passenger car. Behind the two seats was a box which was closed. A

passenger could not see the contents of that closed box. I do not know what it contained. I did not look into that box. I did not know that the car was bringing any liquor. I was not the owner or in possession of any liquor on that day. I have no business with Segurola on that day. I came with him because I wanted to come to San Juan and all I did was to ask Segurola to bring me to San Juan, get in the car and come in with him.

Cross-examination by United States Attorney:

I work at any place where I find work. I work at a pier. I work anywhere. It is about a year ago since I left the pier. I am engaged in many kinds of businesses; among them is buying fowls for the market, which I bring to sell at the market from the country. At Rio Piedras. On that day I was at Fajardo for pleasure. I do not remember whether it was Sunday or Monday. I was there for pleasure. I went there because I wish to be there but have not been there before. I went along in a Ford, whose owner I do not know and paid him a dollar and a half for the trip. I did not go that day. I stayed in Fajardo two days. I slept in the house of a woman of the street.

Q. 3. Was the woman in a relation to you?

[fol. 46] Mr. Mestre: I object to the question, which has no relation to the case.

The Court: They have a right to know what he was in Fajardo for.

Mr. Mestre: But not to go into this detail.

The Court: It tends to bring out what kind of a man he is. He is your witness.

Mr. Mestre: But on a cross-examination he must confine himself to the direct examination.

The Court: You brought out that he went to Fajardo and asked the other defendant for a ride and they have a right to know why he was in Fajardo.

Mr. Mestre: But not what relations he had with a certain woman.

The Court: I think they have a right to know whether he is lying or telling the truth. They may be prepared to prove he was not in Fajardo, I do not know, but they certainly have a right to know.

Witness: I went to the house and met her. There are people who know this kind of woman and I went to one and asked where I could find one. This was at night. During the day I was just taking a walk around town. The next day I did the same thing as I was there for pleasure. I met the woman again. I met her twice. I don't recall the hour that I saw Mr. Segurola in Fajardo. I don't know whether it was in the afternoon, I have no watch.

I know that this affair between the police and Segurola happened in the afternoon because I noticed that it was in the afternoon. I did not notice what part of the day it was when I met Segurola. I paid the chauffeur one dollar and a half to take me to Fajardo. Nothing happened after I left. I have known Segurola a long time. I talked with him on the way over. I do not know Segurola's occupation. He is not an intimate friend. I just know him. Also about four or five years, but I don't know his occupation. Yes the police arrested us both and took us to the police [fol 47] headquarters. I don't know if the police found liquor in the car. I only know that we were taken to the police headquarters. He did not tell me why. I did not see the car being opened. I asked the chief why he took me to headquarters and he answer me 'come with me.' He took me inside and I sat there.

A Juryman: Where did you first see Segurola in Fajardo?

A. In the town on the street. I think it is a two seated car because there were two persons in it. I don't know whether it was a touring car or a runabout. The police did not tell the cause of my arrest. He did not let me go, he took me to the headquarters. I don't know who filed the bond.

The Court: When did you first learn what you were arrested for?

A. After the chief of police took many sacks upstairs he said they contained liquor. I don't know where he got them from. He took them upstairs. It was the police headquarters and he took me inside from outside. I did not see the chief of police search the car. When I first saw Segurola he was in his car at Fajardo. It was moving and I asked him to stop which he did and took me out. I don't

know what part of Fajardo this was. I don't know the streets. When the police stopped us and arrested us at Carolina, we were at the plaza. The car had a collision with a post, striking its fender at the back part. Yes, we were going backward. When the car collided we stopped and the chief of police came to us and opened the car and told them to go to headquarters. That was all I did. I was standing there and asking why take me to headquarters. I don't know who brought the car to headquarters. When we were coming from Luquillo, I did not see the chief of police in a Ford at the bridge nor any police officer putting up his hands to stop the car or making any signal of any kind. The police chief came and opened the back part of the car and told us to go to headquarters, and the car was stopped there and I was on the outside near the car. About five minutes after the collision the police came to my side."

[fol. 48] (6) Because the court denied the motion of the defendants, made at the conclusion of the evidence, to oblige the United States Attorney to elect to proceed on the count charging unlawful transportation of the liquors in question or upon the count charging unlawful possession of said liquors, it being shown from the evidence of the prosecution that there was no possession of said liquors by defendants except the possession of same during the act of transportation charged.

There being no further question, witness was excused and withdrew.

At the conclusion of the testimony taken in the case, Mr. Wilcox for defendants made the following motion:

"Mr. Wilcox: I desire to make a motion at this time.

The Court: The jury will be excused until two o'clock this afternoon.

Mr. Wilcox: Counsel for the defendants move the court to direct the prosecution to elect between the first and second counts thereof. That is to say, that the Government be forced to elect whether or not they will prosecute these de-

fendants for possession of the liquors charged to have been found in their possession, or upon the charge of transportation, for it appears from the theory of the prosecution's case as shown by the evidence that the possession with which the defendants are charged in the first count is necessarily included in the transportation as charged in the second count; for it appears from the evidence that the possession and transportation refers to the same liquor and to the same dates and are identical acts. I hope I have made that clear but I will make it clearer in argument."

Whereupon the hearing was adjourned until 1:30 o'clock P. M. on July 8, 1925, at which hour the court reconvened, in the presence of the accused and their counsel, and the following proceedings were had:

Following argument by counsel on the motion of Mr. Wilcox.

"The Court: The motion is overruled.

Mr. Wilcox: I take an exception."

[fol. 40] (7) Because the defendants were placed in jeopardy twice and tried and convicted for the same offense, it not appearing from the evidence of the prosecution that the defendants were in possession of the liquors described in the information at any time or place except at the time and place they were charged with having unlawfully transported same.

As the only evidence received at the trial which referred in any way to the foregoing assignment the substance of the testimony of the following witnesses is reproduced:

Policeman Alfonso Ceballos, for the prosecution, whose testimony appears in pages 2, 3 and 4 [printed pages 37-40] of this bill of exceptions.

"My name is Ismael Ozaz, I live at Carolina, P. R. On or about May 26, 1925, I was at the plaza in Carolina. I know Chief of Police Ceballos. I am a chauffeur. On that day I was at the plaza at Carolina and Chief of Police Ceballos came to me and told me to take him to the other side of the bridge in my car.

[The United States Attorney agrees that there was no search warrant to search the automobile.]

When we crossed the bridge we saw a car coming and he told me: *'Now you have to get in the way of this car and stop it.'* When he said 'me' to refer to myself; I said 'him' I refer to the chief of police. I told him that I could not do that because I was not going to destroy my car. Then the car that was coming passed us and he turned my car and we followed it. I do not know what kind of a car it was. Then we went to the town and while there we saw the other car coming and we came in its way, and the other car was moving backward and it had a collision with a post. I did not see the car at this time. I know that there was a collision because we stopped on one side of the plaza and the collision was on the other. I know there was a collision because I saw it. Yes, sir, I saw the car. I cannot say what kind of a car it was, whether a Packard or a Buick; it looked like a Packard or a Buick. When we got to the plaza we stopped the car and the chief of police called out and went toward the car that had collided to the other car. He [fol. 50] then took some passengers and went away. I do not know their names."

Jose Alvarez for the prosecution:

"My name is Jose Alvarez. I live at Carolina. I am a chauffeur. I do not know Segurola or Manuel Santiago. I know Chief of Police Ceballos of Carolina. On or about May 26, 1925, I was at Carolina and saw chief Ceballos on that day. I was at the plaza at Carolina and saw a car that had collided with a post. I went toward the car and found the chief of police opening the back of the car, taking a bottle of liquor out of it. I saw a two passenger Buick car. There were two persons in it whom I do not know. I might recognize them if I saw them. [Identifies defendants Segurola and Santiago.] I am positive that I saw these two persons in the car at that moment. The Chief of Police Ceballos told me to take the car to headquarters and we took it there. When the chief of police told me the car had collided with the post, to take the car to headquarters, he took the two persons in another car. I did not see the liquor at headquarters. This was in the afternoon.

Cross-examination by Mr. Mestre:

My name is Jose Alvarez. I did not notice at the moment which of the two persons seated in the car was at the driver's wheel. The chief of police took some liquor from the back part of the car, I said the top of the back part of the car and took it from there. The liquor could not be seen unless the top was off.

The Court: Will you please recall the chief of police, Ceballos, as I would like to ask him another question?

Whereupon said witness was called and testifies as follows:

Examination by the Court:

On the date mentioned Augustin Segurola was driving the car. I seized this car because of confidential information which I received by telephone and also the manner in which Segurola acted by passing me at high speed.

Q. 1. What did he do that made you suspicious?

[fol. 51] A. In the first place he put his car on my car and then he ran away. The confidential information that I received was that through Luquillo a car had passed driven by Augustin Segurola and containing intoxicating liquors.

Cross-examination by Mr. Mestre:

I have stated that I was suspicious because he threw his car against my car and because he ran away at great speed. By saying that he threw his car against mine, I mean that he tried to have a collision with my car and if it had not been for my chauffeur, he could have done so.

He tried to bump his car against mine but he had no collision because we let him pass. From his attitude he tried to bump his car on my car. The reason I had at that time if we had not taken the precaution we took, he could have bumped his car against mine. We had to let him go by and he ran away. I say he ran away because he was driving at a great speed. When his car met my car, he put it in reverse and went away and that gave me suspicions that he was driving to run away. Yes, sir, that was the town. I met him near the town, about three kilometers away. He put the car in reverse in town three kilo-

meters from the place where I first met him. I say he tried to run away from me at the first time I met him because he tried to bump his car on mine and it was going at great speed.

No, sir, I did not order him to stop. I did not do so because we tried to make him stop by getting in his way.

Examination by United States Attorney:

I stated that Segurola's car collided with the post.

Q. 2. In your opinion if the post had been a person, could that person have avoided the collision in the same way you avoided the collision with him?

A. That is very difficult because he was going very fast.

Answers to Questions by a Juryman:

This was about five o'clock in the afternoon.

I was dressed in uniform. I tried to get in his way and [fol. 52] make him stop. Yes, sir, there are many Fords turning around on the public roads every day. Segurola should have thought I was different from any other Ford because he saw me in uniform and think he was violating the law and he ran away. I know that he saw my uniform as he was going past because he passed by my side and had to see me. No, sir, I did not get out of the Ford car to make any signs to him to stop."

Manuel Santiago, defendant, whose testimony appears in pages 10 to 16 [printed pages 44 to 48] of this bill of exceptions.

(9) And specifically as to the defendant, Manuel Santiago, there was insufficient evidence to justify a conviction on either of the two counts charged in the information.

The record of the testimony taken at the trial of the case, the substance of which was approved by the court on September 2, 1925, is by reference made a part of the bill of exceptions and is relied upon in support of this and other assignments herein appearing insofar as same is applicable to each.

(10) Because the court erred in overruling the defendants' motion for a new trial.

The defendants on July 13, 1925, filed the following motion for a new trial, which was argued and denied on the twenty-first day of July, 1925:

MOTION FOR NEW TRIAL.

Come now the defendants in the above-entitled cause and move the court for a new trial, for the following reasons, to wit:

1. Because the defendants were not furnished, upon application for same, with a copy of the accusation against them in said cause, as provided by law, to which defendants seasonably noted an exception.

2. Because the defendants were held to answer for a criminal offense in the above-entitled cause and tried thereon without due process of law, to which defendants noted an exception.

3. Because the verdict of guilty rendered by the jury in the above-entitled cause at the trial of same was contrary to the law and the evidence.

4. Because the court refused to allow counsel for the [fol. 53] defendants to cross-examine the witness for the prosecution police officer Ceballos as to the source of the information testified by him to have been received by him to the effect that the approaching automobile in which defendants were, was being used at that time by defendants in transporting liquors in violation of the Federal Prohibition Law, to which refusal attorneys for defendants noted an exception.

5. Because the court admitted as evidence at the trial of said cause the liquors alleged to have been seized by the police officer Ceballos, the court having previously at the trial refused to allow the attorney for the defendants to cross-examine the said officer Ceballos as to the source of the information testified by him to have been received that the defendants were approaching Carolina in an automobile used by them in transporting at the time liquors in violation of the Federal Prohibition Law, to which defendants noted an exception.

6. Because the court admitted improper evidence at the trial against the defendants to which defendants noted exceptions.

7. Because the court refused to admit proper evidence offered by defendants in their defense, to which refusal defendants noted exceptions.

8. Because the court allowed the United States Attorney, over the objection of the defendants' attorney, to cross-examine the defendant Manuel Santiago as to matters not properly related to the direct examination, and not pertinent in any way to his defense, and to the prejudice of the said defendant, to which attorney for defendant noted an exception.

9. Because the court denied the motion of the defendants made at the conclusion of the evidence for the prosecution, to oblige the United States Attorney to elect to proceed on the one or the other counts contained in the information, and not as to the other, to which denial the defendants noted an exception.

10. Because the defendants were placed in jeopardy and tried twice and convicted twice for the same offense.

11. And specifically as to the defendant Manuel Santiago [fol. 54] there was insufficient evidence to justify a verdict of guilty on either count contained in the information.

Wherefore, the defendants pray that the court set aside the judgment if same has been entered, and the verdict, and grant a new trial to both defendants, or in the alternative as to the defendant Manuel Santiago.

And now, in furtherance of justice and that right may be done, the defendants present the foregoing as their bill of exceptions in this case, and signed and certified by the judge, as provided by law.

E. B. Wilcox, Salvador Mestre, Attorneys for Defendants.

Notified with service of copy on December 2, 1925.

Jesus A. Gonzalez, Assistant United States Attorney.

To the District Attorney:

Please take notice that the foregoing bill of exceptions will be called for settlement on Saturday, December the fifth, at 9:00 a. m., or as soon thereafter as the parties may be heard.

_____, Attorneys for Appellant.

Order Approving Bill of Exceptions

Approved December 9, 1925.

Ira K. Wells, Judge.

In United States District Court

Order Enlarging Time—December 5, 1925

Upon motion of the defendant, the time for filing of the transcript of record in the Circuit Court of Appeals at Boston, Mass., is enlarged to and including December 23, 1925.

[fol. 55] In United States District Court

Supplemental Praecipe for Transcript of Record—Filed December 7, 1925

To the Clerk:

Please include in the transcript of the record of the above-entitled cause for the use of the United States Circuit Court of Appeals for the First Circuit, in addition to those papers and documents whose inclusion have been requested by the defendants' praecipe heretofore filed, all orders of the court extending the time within which the transcript of the record may be filed in the above-mentioned Circuit Court of Appeals.

San Juan, Porto Rico, December 7, 1925.

E. B. Wilcox, Of Counsel for Defendants.

Notified with delivery of a copy of the foregoing, December 7, 1925.

John L. Gay, United States Attorney.

In United States District Court

Supplemental Praecipe for Transcript of Record—Filed December 16, 1925

To the Clerk:

Please include in the transcript of the record of the above-entitled cause for the use of the Circuit Court of Appeals for the First Circuit, in addition to those papers and documents whose inclusion have been requested by the defendants' praecipes heretofore filed, the following:

1. Order of October 31, 1925, extending the May, 1925, Term into the November, 1925, Term.

2. Bill of exceptions.

San Juan, Porto Rico, December 16, 1925.

E. B. Wilcox, Of Counsel for Defendants.

[fol. 56] Notified with delivery of a copy of the foregoing, December 16, 1925.

John L. Gay, United States Attorney.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 57] In United States Circuit Court of Appeals for the First Circuit, October Term, 1922

No. 1922

Augustin Stagnola et al., Defendants, Plaintiffs in Error,

v.

United States of America, Defendant in Error

Error from the District Court of the United States for the District of Porto Rico

Before Bingham, Johnson and Anderson, J.J.

Opinion—December 18, 1926

Anderson, J.:

On an information in two counts,—the first for possession, and the second for transporting liquor contrary to

the National Prohibition Act. Both defendants, Segurola and Santiago, were found guilty. Santiago was fined $100 under the first count, $200 under the second count, and one-half the costs of the proceedings. Segurola was fined $200 under the first count, $300 under the second, and the other half of the costs.

The record shows facts as follows:

Ceballos was, on May 26, 1923, an officer in the insular police force. On that day, as the result of confidential information by telephone to the effect that Segurola, in a Buick automobile, was coming from Luquillo to Loiza, Ceballos took a Ford car and went out to meet the expected Buick. When he saw the Buick approaching he attempted [fol. 58] to block it, but Segurola maneuvered past him. Ceballos then gave chase, keeping Segurola in sight until they reached Carolina, where he passed Segurola, cut in front of and blocked him. Segurola thereupon backed his car, and collided with an electric post. Ceballos then arrested Segurola, searched his car, and found whiskey, brandy, vermouth and gin. These liquors were seized and were admitted in evidence.

(1) The first two assignments involve the defendants' right to be furnished by the government with a copy of the information. When the defendants were arraigned, they pleaded not guilty, and requested that a copy of the information be furnished them free of charge. This request was refused by the court "for the reason that I know of no law requiring the same."

At the close of the trial this same contention was reasserted, and an exception saved to the court's ruling: "That at the time that the defendants pleaded to the information, the information was in court and open to their inspection, and the defendants and their attorneys were informed by the court that they were at perfect liberty to examine said information in any way they desired or at perfect liberty to make copies thereof or to order the copies to be made and certified to by the clerk upon the payment of the fee as provided by law."

The defendants' contention is grounded on Section 2 of the Organic Act, 39 Stat. 951, which reads:

"That in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his de-

fense, to be informed of the nature and cause of the accusation, and to have a copy thereof, to have a speedy and public trial, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor."

Analogous provisions in the United States are the Sixth Amendment and Revised Statutes, Sec. 1033, which were construed by the Supreme Court in United States v. Van Duzee, 140 U. S. 169, 172, as follows:

"By the Sixth Amendment to the Constitution, 'in all criminal prosecutions, the accused shall enjoy the right [fol. 59] * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.' By Section 1033, where a person is indicted for a capital offense a copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before his trial. There would appear to be a negative pregnant here, and it has accordingly been held that in cases not capital the prisoner is not entitled to a copy of the indictment at government expense. United States v. Bickford, 4 Blatchford 337; United States v. Hare, 2 Wheeler, C. C. 283, 288. Nor is he entitled to a list of witnesses and jurors. United States v. Williams, 4 Cranch, C. C. 372; United States v. Wood, 3 Wash. C. C. 440. There is no other statutory provision for carrying out the constitutional obligation of the government to inform the prisoner of the nature and cause of the accusation, or for summoning witnesses, or procuring the assistance of counsel, except that by Section 878 indigent defendants are entitled to have their witnesses subpoenaed at the expense of the government. There is, however, no general obligation on the part of the government either to furnish copies of indictments, summon witnesses or retain counsel for the defendants or prisoners. The object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the government."

Probably a like construction should be given to Section 2 of the Organic Act. It is, however, unnecessary to rule

flatly on this question, for at most it was harmless error. The defendants were not misled or prejudiced. Under St. of 1919, 40 St. 1181 amending Sec. 269 Judicial Code, it is the duty of this court not to sustain such technical errors as do not affect the substantial rights of the parties.

It follows that the first and second assignments are without merit. Doubtless the better practice would be to conform to what defendants' counsel claims has hitherto been the custom in Porto Rico, that the government furnish counsel for accused persons a copy of the information or indictment.

[fol. 60] (2) In the third and fourth assignments the defendants complain because the seized liquors were admitted in evidence after the court had refused defendants' counsel the opportunity to cross examine Ceballos, the officer who seized them, as to the source of his information that Segurola was on the road in a Buick, presumably transporting liquor contrary to law.

The contention is that, without the previous telephoned information, there was no probable cause for the seizure, within the rules laid down in Carroll v. United States, 267 U. S. 132, 154. But this is not so.

Ceballos testified that he seized Segurola's car "because of confidential information which I received by telephone and also the manner in which Segurola acted in passing me at high speed"; and, on cross examination by the defendant's counsel, he reiterated and elaborated his statement that he "was suspicious because he (Segurola) threw his car against my car and because he ran away at great speed. * * * I say he tried to run away from me the first time I met him because he tried to bump his car on mine and it was going at great speed."

On this record there was, therefore, apart from any confidential communication, abundant evidence of probable cause for the seizure under the principles in the Carroll case, supra.

It is true that Ceballos on his direct testimony stated, without objection, that he "had information by telephone, confidential, to the effect that a Buick automobile driven by Segurola was coming." On cross-examination the following occurred:

"Q. 1. Now you have stated that you received confidential telephone information that there was a car coming with liquor, did you not?

A. Yes, sir.

Q. 2. Who gave you that information?

Mr. Gonzalez (Assistant United States Attorney): I object as they are the secrets of the police force, which should not be stated in a court of justice, and the stating of the source of such information would be against public safety.

The Court: The objection is sustained.

Mr. Mestre: I take exception."

[fol. 61] This ruling was right.

Voget v. Gruaz, 110 U. S. 311.

In re Quarles, 158 U. S. 532.

See also Worthington v. Scribner, 109 Mass. 487, one of Mr. Justice Gray's learned and exhaustive opinions reviewing most of the pertinent earlier authorities. The same principle is enunciated in State v. Fortin, 106 Maine 382.

Elrod v. Moss, 278 Fed. 123, 127.

Arnstein v. United States, 296 Fed. 946, 950.

The case is in that regard plainly distinguishable from Steen v. First National Bank, 298 Fed. 36, a learned opinion by Circuit Judge Sanborn for the Eighth Circuit Court of Appeals. That was a suit for malicious prosecution; it appeared that the bank officials, through whom the plaintiff claimed a groundless prosecution had been instituted, had at the preliminary examination of Mrs. Steen, voluntarily testified to the confidential communications made by them to the prosecuting officer. Under these circumstances, that learned court held that the privilege was personal and had been waived. But that court recognizes (298 Fed. 40), that if the privilege had been seasonably claimed it would have been the duty of the court to sustain it. The case is, therefore, on analysis of the facts, an authority for the government and not for the defendants, in the instant case.

(3) The fifth assignment relates to the extent of the cross-examination of Santiago, who took the stand in his own behalf and testified to the effect that he had no association with Segurola except to ask him to take him in his

car over to San Juan; that he saw and knew of no liquor in the car. On cross-examination the United States Attorney was permitted to show that Santiago was in Fajardo in company with a woman of doubtful character. But, while there was objection made to this cross-examination, no exception was saved.

It follows that this assignment cannot be sustained, even if otherwise this court might be constrained to hold Santiago prejudiced.

[fol. 62] (4) The eighth assignment is to the effect that there was no sufficient evidence to convict Santiago. But he took the stand in his own behalf, and it was for the jury to say whether, in the light of his appearance and of all the circumstances of the case, his story that he was a mere passenger, without knowledge of or participation in the illegal transportation, was true or false.

(5) But the sixth and seventh assignment of errors relate to the conviction and sentence under both counts, for possessing and transporting the same liquor. In that regard we think this case falls under the familiar principle illustrated in such cases as Schroeder v. United States, 7 Fed. (2d) 60, 65; Page v. United States, 278 Fed. 41, 45; Friedman v. United States, 13 Fed. (2d) 632; and that there was no such separate possession and transportation as to constitute two offences. It follows that the convictions under the first count for possession must be reversed, and as to the second count, for transportation, affirmed.

The convictions under the first count are reversed and those under the second count are affirmed, and the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION

BINGHAM, J. (dissenting):

The question as to which I desire to record my dissent is the one relating to the cross-examination of the prohibition officer who was called as a witness by the Government. The

record shows that this witness, having been called by the Government and having testified to the receipt of a telephone communication just prior to the seizure and arrest of the defendant and what that communication was, when asked on cross-examination from whom he received the communication, was not allowed to state the name of the person, on the ground that the communication was privileged, and the defendant excepted. I agree that the communication was a confidential one, which the Government, and it alone, was privileged to disclose or withhold. Voged v. Grnaz, 110 U. S. 311, 316; Worthington v. Scribner, 109 Mass. 487. My position is that the Government, having [fols. 63 & 64] called the officer to whom the communication is said to have been made and required him to state what the communication was, thereby waived its privilege and subjected the witness to cross-examination upon the subject matter of the communication, including the name of the person by whom it was made; that the Government could not require the officer to disclose so much of the matter as was helpful to it, and then shut the door as to any further inquiry by the defendant relating to the communication; that having required a partial disclosure, or rather one substantially covering the entire matter, it waived its privilege and the defendant became entitled to a full disclosure. Regina v. Richardson, 3 F. & F. 693; Worthington v. Scribner, 109 Mass. 487 at 492.

The communication, to the extent that it was given, was important evidence for the Government and in fact the only material evidence bearing upon the legality of the seizure and arrest made by the officer, viz: whether he had probable cause for stopping and searching the defendant's automobile and making the arrest, a vital issue in the case. The evidence which the witness (the officer making the seizure) gave may, or may not, have been truthful: he may, or may not, have received the communication and, if he received it, it may not have been obtained from a person worthy of credit. If it was not received from a person worthy of credit, it could be found that the officer acted without probable cause in making the seizure; and if the name of the person said to have made the communication had been given and he had been called as a witness and denied making the communication, it might reasonably be

found that the communication was not made, that probable cause for the seizure did not exist, and that the seizure was illegal. Cross examination is an essential method in the trial of a cause of ascertaining the truth of testimony given in direct examination, and the denial of that right in this case was so plainly prejudicial as to warrant a new trial.

[fols. 65-70] Petition for rehearing covering five pages omitted from this print. It was denied and nothing more by order of January 26, 1927.

[fol. 71] In United States Circuit Court of Appeals

JUDGMENT—December 18, 1926

This cause came on to be heard October 22, 1926, upon the transcript of record of the District Court of the United States for the District of Porto Rico, and was argued by counsel for the defendant in error, plaintiffs in error submitting on brief by leave of court.

Upon consideration whereof, it is now, to wit, December 18, 1922, here ordered, adjudged and decreed as follows: The convictions under the first count are reversed and those under the second count are affirmed, and the case is remanded to the District Court for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

Arthur L. Charron, Clerk.

In United States Circuit Court of Appeals

ORDER DENYING REHEARING—January 26, 1927

No judge who concurred in the opinion announced December 18, 1926, desiring a rehearing, It is ordered that the petition for rehearing filed January 25, 1926, be, and the same hereby is denied.

By the Court.

Arthur L. Charron, Clerk.

[fol. 72] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 73] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 25, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6804)

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IN THE SUPREME COURT OF THE UNITED STATES

AGUSTIN SEGUROLA and
MANUEL SANTIAGO.
Defendants and Plaintiffs
in Error.
vs
United States of America,
Defandant in Error.

No.....

PETITION FOR A WRIT OF CERTIORARI.

The petitioners herein, Agustin Segurola and Manuel Santiago, defendants and plaintiffs in error show unto this Honorable Court, the following:

1.—That the said petioners were tried and convicted in the District Court of the United States for Porto Rico on the charge of "possession" and "transportation" of intoxicating liquors in violation of the National Prohibition law and upon a verdict of guilty were sentenced on both counts, (R. p. 7) on July 21st. 1925; that upon a writ of error sued out in the U. S. Circuit Court of Appeals for the First Circuit, this court by unanimous judgment set aside and reversed the sentence of the District court on the first count of "possession" (R. p. 71), and by majority vote affirmed the convictions of both petitioners on the count of "transportation" (R. p. 71), the dissenting member of the court holding that the search of the automobile was illegal and that the convictions as to both petitioners should be reversed. (R. p. 62).

2.—The assignments of error before the said Circuit Court of Appeals were as follows:

1.—Because the defendants were not furnished, upon application for same, with a copy of the information filed against them in the above entitled cause, as provided by the Act of Congress of 1917, known as the Organic Act of Porto Rico, to which defendants seasonably noted an exception.

2.—Because the defendants were held to answer for a criminal offense in the above entitled cause and tried and convicted thereon without due process of law, because defendants were not furnished with a copy of said charges.

3.—Because the court refused to allow counsel for defendants to cross-examine the witness for the prosecution, police officer Ceballos, as to the source of the information testified by him to have been received to the effect that the approaching automobile in which defendants were was being used at the time by defendants in transporting liquors in violation of the Federal Prohibition Law, to which refusal attorneys for defendants noted an exception.

4.—Because the court admitted as evidence at the trial of said cause the liquors seized by the police officer Ceballos and delivered (it) to the Federal Director of Prohibition for this prosecution, the court having previously, during the trial, refused the attorneys for the defendants to cross-examine the officer Ceballos as the source of the information testified by him to have been received that the defendants were approaching the town of Carolina in an automobile used by them at the time in transporting liquors in violation of the Federal Prohibition Law, to which defendants noted an exception.

5.—Because the court allowed the United States Attorney, over the objection of defendants' attorney to cross-examine the defendant Manuel

Santiago as to matters not properly related to the direct examination, and not pertinent to his defense and to the prejudice of said defendant, to which attorney for defendants noted an exception.

6.—Because the court denied the motion of the defendants, made at the conclusion of the case for the prosecution, to oblige the U. S. Attorney to elect to proceed on the count charging unlawful transportation of the liquors in question or upon the count charging unlawful possession of said liquors, it being shown from the evidence of the prosecution that there was no possession of said liquors by defendants except the possession of same during the act of the transportation charged.

7.-Because defendants were placed in jeopardy twice and tried and convicted twice for the same offense, it not appearing from the evidence of the prosecution that the defendants were in possession described in the information at any time or place except at the time and place they were charged with transporting same.

8.—And specifically, as to the defendant Manuel Santiago, there was insuficient evidence to justify a conviction on either of the two counts charged in the information.

9.—Because the court erred in overruling the defendants' motion for a new trial (See R. 9-11)

3.—Within a date allowed by order, the C. C. A. permitted the petitioners to file a petition for a rehearing upon assignments of error stated therein, (R. pp. 65-69) and on January 26th. 1927 an order was entered denying the said petition because neither of the two judges constituting the majority had expressed a desire to rehear same. (R. p. 71)

4.—Your petitioners respectfully say that the judgment of the C. C. A. of December 18th. 1926, in so far as it affirmed the judgment of the trial court on the count charging "transportation" was erroneous and prejudicial to your petitioners, and to said judgment they assign the following as error.

ASSIGNMENTS OF ERROR.

(a) In not holding and deciding that defendants were entitled to have a copy of the information upon demand therefor, as provided by Sec. 2 of the Act of Congress of 1917, known as the Organic Act for Porto Rico, and were therefore tried and convicted without due process of law.

(b) In holding and deciding that the defendants were not prejudiced by not receiving a copy of the information containing the charges upon which they were tried.

(c) In not holding and deciding that the automobile, there being no search warrant, was illegally searched and the liquors illegally seized.

(d) In not holding and deciding that the liquors were erroneouly admitted in evidence, because there being no search warrant, the prosecution showed no "resonable cause " for belief on the part of the officer, as laid down in the rule of this Court in Carroll vs. U. S. 267 U. S., at p. 154.

(e) In not holding and deciding that it was error on the part of the trial court in refusing to permit defendants to cross-examine the officer as to the source of the information alleged to have been received by him by telephone, that the defendant Segurola was approaching the town of Carolina in an automobile transporting liquors in violation of law.

(f) In deciding and holding that the ruling of the trial court was correct, that the telephone message alleged to have been received by the officer that the defendant Segurola was approaching the town of Carolina in an automobile transporting liquors in violation of law, was a "priviledged communication" as to which the defendants could not cross-examine.

(g) In deciding and holding that independently of the alleged telephone message, the facts observed by the officer making the search and seizure, were sufficient to justify th search and seizure of the

liquors and their admission as evidence, under the rule laid down in Carroll vs. U. S. 267 U. S. at p. 154.

(h) In not deciding and holding that the liquors were erroneously admitted in evidence because of prejudicial error committed by the trial court in the proceedings had to identfy the liquors and to prove that they were such as were in violation of law.

(i) As to the defendant Manuel Santiago, independently of the foregoing errors assigned, the court erred in not holding that there was insufficient evidence to sustain a conviction against this defendant.

5.—Your petitioners are advised that the judgment of the U. S. Circuit Court of Appeals is final, and is erroneous, and that this Honorable Court, in justice, should require the case to be certified to it for its review and deteminatfon but only on the errors herein assigned, as by law provided.

6.—Your petitioners say that the holding that the bare statement of an officer of hearsay evidence said to have been received by telephone, may not be inquired into upon cross-examination, and that such furnishes "probable cause" for searching an automobile, without more, reduces the constitutional guarantee to a form of words in this Circuit, in such cases. Under such a holding, as a practical matter, the 4th. amendment disappears from the constitution. Within this circuit enforcement agents may search automobiles without restraint imposed by the 4th and 5th and amendments and the rule in the Carroll case. The holding is a virtual repeal of the amendments mentioned and affects the rights of the citizens of the states, and this territory, composing the first circuit. If the holding be correct the public are at the mercy of police and enforcement officers, as under the ruling complained of, there would be no way to contradict them, nor to punish them or their informants for perjury or to seek redress in damages.

The failure to hold that accused persons charged with the violation of federal laws in Porto Rico are entitled to have a copy of the information or indictment as provided by the Act of Congress of 1917, known as the Organic Act for Porto Rico deprives the inhabitants of this country of

an important right which Congress saw fit to create and to protect. The rights of some millions of citizens are prejudicially affected by the holdings herein complained of.

WHEREFORE YOUR PETITIONERS PRAY that a writ of certiorari be issued under the seal of the court, directed to the United States Circuit Court of Appeals for the First Circuit, sitting at Boston, Mass. comanding it to certify and to send to this court on a day to be designated a full and complete transcript of the record and all proceedings had in said court in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by law, and that the said judgment as complained of be reversed by this Honorable Court, and for such other relief as may seem proper.

SALVADOR MESTRE,
E. B. WILCOX,
Attorneys for Petitioners.

Personally appeared before me Agustin Segurola, who being duly sworn according to law, deposes and says. I am one of the defendants and plaintiffs in error, and petitioners in the above entitled cause; I have read the foregoing petition and the contents thereof is true to the best of my knowledge and belief.

A. SEGUROLA,
Petitioner.

Subscribed and sworn to before me in San Juan, P. R. by Agustin Segurola, one of defendants herein, on this the 25 day of February, A. D. 1927, who is personally known to me.

LULU G. DONOHUE,
Clerk of the District Court of the United States for P. R.

By A. J. AGUAYO.

Notified by receipt of a copy of the foregoing petition on this the ..... day of February, A. D. 1927.

.....
U. S. Attorney.

CERTIFICATE OF COUNSEL.

We the undersigned certify that we have examined the foregoing petition, that in our opinion it is well founded and is entitled to favorable consideration of the court and it is not filed for delay.

SALVADOR MESTRE,
E. B. WILCOX.

I certify that on this date I have mailed in the post office at San Juan, P. R., a true copy of the foregoing petition and petitioner's supporting brief, addressed, postage paid, to John L. Gay, United States Attorney, San Juan, P. R., whose mailing address is that stated.

San Juan, P. R., February 26, 1927.

E. B. WILCOX,
Of Counsel for Ptitioners.

IN THE SUPREME COURT OF THE UNITED STATES

AGUSTIN SEGUROLA and
MANUEL SANTIAGO,
Defendants and Plaintiffs
in Error,

vs

United States of America,
Defendant in Error.

No. .....

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

With some modification we adopt the facts stated by the appellant court in the majority opinion (R. p. 57) reading:

> "The record shows facts as follows: Ceballos was, on May 26th. 1923, an officer in the insular police force. On that day, as the result of confidential information by telephone to the effect that Segurola, in a Buick automobile, was coming from Luquillo to Loiza, Ceballos took a Ford car and went out to meet the expected Buick. When he saw the Buick approaching he attempted to block it, but Segurola manoevered past him. Ceballos then gave chase, keeping Segurola in sight until they reached Carolina, where he passed Segurola, cut in front of and blocked him. Segurola thereupon backed his car, and collided with an electric post. Ceballos then

arrested Segurola, searched his car, and found whiskey, brandy, vermouth and gin. These liquors were seized and were admitted in evidence."

The officer may have purposed intercepting the encoming car but did nothing observable to Segurola to carry such a purpose into effect.

(R. p. 38) The officer stated that he told his chauffer to put his car across the road to stop the oncoming car. But does not state that this was done. Ismael Colón, the chauffer, (R. p. 49) stated that he was told to do so by the policeman, but that he did not do so, as he was afraid o a collission. The police officer, questioned by a juror (R. p. 52) stated that he did not get out of his car to make any sign for Segurola to stop; as he passed by he had to see his uniform. These statements are not contradicted elsewhere in the record. As to the other defendant, Manuel Santiago, he was an accidental passenger and had no knodwledge of the presence of liquors in the car or participation in the transaction. (R. p. 45) His testimony is not contradicted to this effect and there is no evidence connecting him with the transaction except the fact of his being in the car, which was a Buick runabout or roadster, with a large compartment in the rear which was closed. J. Alvarez, witness for the prosecution, (R. p. 50) stated "The liquor could not be seen unless the top of the car was off." This is not contradicted. The liquors seized on May 26th. 1923 were on the following day turned over the Federal Prohibition Director for prosecution in this case. (R. p. 39) There is no local prohibition law in Porto Rico. By agreement and by law the insular police act in enforcing the federal prohibition law, and in no case has the U. S. District Court refused relief because the police are not federal officers. Congress by specific legislation has given the insular courts jurisdiction to try violations of the federal law.

ARGUMENT.

The two points of fundamental importance in this case are the failure of the trial court to direct a delivery to defendants on their request for same, a copy of the charges not received, in violation of section 2 of the Act of Congress

of 1917, known as the Organic Act for Porto Rico, and the illegal search of the automobile and the seizure of its contents in violation of the 4th. and 5th. amendments of the Constitution of the U. S. enacted in section of the Act of Congress of March 2nd. 1917, known as the Organic Act for Porto Rico, as construed by the holding of this Court in reference to the search of automobiles in Carroll vs. U. S., 267 U. S. at page 154. This Court taking jurisdiction on these two points may proceed also to correct the other errors complained of.

ERRORS ASSIGNED.

(a) and (b) may be argued together. They refer to 1 and 2 assigned to the trial court.

> (a) In not holding and deciding that defendants were entitled to have a copy of the information upon demand therefore, as provided by Sec. 2 of the Act of Congress of 1917, known as the Organic Act for Porto Rico, and were therefore tried and convicted without due process of law.
>
> (b) In holding and deciding that the defendants were not prejudiced by not receiving a copy of the information containing the charges upon which they were tried.

At the time of the arraignment and at the trial the defendants asked to be furnished with a copy of the charges, and took exceptions when refused them. (R. pp. 5 and 44). Section 2 of the Act of Congress of 1917, known as the Organic Act for Porto Rico, reads in part, as follows:

> "That in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense, and to be informed of the nature and cause of the accusation, and to have a copy thereof, to have a speedy trial."

Unied States vs. Van Duzee, 140 U. S. 165 is relied upon by the appellee as authority that no obligation exists to furnish the copy. This case was to determine the right of

the Clerk to collect fees for such copy, and involved a construction of the Sixth Amendment of the Constitution which contains no specific provision "and to have a copy thereof" as appears in the Organic Act. The situation in Porto Rico under the Organic Act, is like that the Supreme Court in the Van Duzee case intimated it would be in capital case as provided by Sec. 1033, mentioned in that opinion providing that in such cases a copy is to be furnished. The trial Judge said: "I know of no law requiring the same." (R. p. 5) in denying the request. But while holding that under the Sixth amendment, in the Van Duzee case this court said that the Clerk was not entitled to a fee in that case, it also said at page 173:

> "We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the government, and under the order the Clerk is entitled to his fee."

The *authority* of the court to grant the application rested upon the above quoted language of this court, and the *obligation* to do so rested upon the specific provision mentioned in Sec. 2 of the Act of Congress mentioned.

No enabling legislation appears to have been enacted providing what officer of the court shall furnish the copy, there is no rule of the trial court, in the absence of both the District Court of the United States in the Van Duzee case at page 574 in 41 Fed., correctly we think, says:

> "Under the Code of Iowa, it is required, upon arraignment a copy of the indictment shall be furnished in every case. The common practice prevailing in the state aids the court in determining in what mode the constitutional provision shall be carried out".

Section 142 of the Criminal Code of P. R. in force for over twenty years in Porto Rico, reads:

> "The arraignment must be made by the prosecuting attorney, which consists in reading the informa-

> tion to the defendant and delivering to him a copy thereof."

A fortiori, the holding in the Van Duzee case should apply in a criminal case on a question involving the constitutional rights of an accused.

POINT NOT DECIDED.

While not deciding the point the C. C. A. said that probably the ruling in the Van Duzee case should apply. It seems clear that the Supreme Court meant to hold that if there was specific legislation that a copy must be furnished, as provided in capital cases, the holding would have been different. That appears in the section mentioned of the Organic Act, and it does not appear in the Sixth amendment, construed in that decision. It is also important to bear in mind the court was not passing upon the right of the accused as that right exists in the instant case, and the C. C. A. apparently overlooks the language of this court at page 173:

> "We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the government, and under such order the clerk is entitled to his fee."

PREJUDICE PRESUMED FROM ERROR.

The C. C. A. assuming that if error was committed, says it was not prejudicial; that the substantial rights of the defendants' were not affected. We shall not cite cases that prejudice is presumed as a matter of law when error is shown. The record would probably not show the prejudice suffered. It would be suffered in hampering and crippling a defendant in the preparation of his case for trial. Such might or might not get into the record. How can it be known what difficulties a defendant might encounter in the preparation of his case for the trial by not having a copy of the charges upon which he is being tried. Our point is *that the record does not show that defendants were*

not thus prejudiced. At the arraignment they demanded a copy and again at the trial objected that they had not been furnished it. We are contending for the recognition of a vital principle with the view of correcting, what we understand to be the mistaken practice of the District court in refusing, by the delivery of a copy of the charges, to inform defendants of "the nature and cause of the accusation." These defendants raised the point at the first opportunity; they never failed to object to being tried without this compliance with the law and we respectfully urge that they are entitled to take the benefit of their objection, and it is most important that the jurisdicion have a clear cut decision on so important a principle.

The following assignments may be considered togother.

(c) In not holding and deciding that the automobile, there being no search warrant, was illegally searched and the liquors illegally seized.

(d) In not holding and deciding that the liquors were erroneously admitted in evidence, because there was no search warrant the prosecution showed no "reasonable cause" for belief on the part of the officer, as laid down in the rule of this court in Carroll vs. U. S. 267 U. S. at page 154.

(e) In not holding and deciding that it was error on the part of the trial court in refusing to permit defendants to cross-examine the officer as to the source of the information alleged to have been received by him by telephone, that the defendant Segurola was approaching the town of Carolina in an automobile transporting liquors in violation of law.

(f) In deciding and holding that the ruling of the trial court was correct that the telephone message alleged to have been received by the officer that the defendant Segurola was approaching the town of Carolina in an automobile transporting liquors in violation of law, was a "privileged communication" as to which the defendants could not cross-examine.

The last stated assignments may be considered together. It was agreed that there was no search warrant. (R. p. 49).

POINT 1.—The search was illegal and it was error to admit the liquors as evidence.

POINT 2.—Reversible error was committed in the proceedings identifying the liquors and attempting to prove that they were of a character prohibited by law.

The decision of the C. C. A. by majority vote, is, first; independently of what the officer observed in the conduct of the defendant, Segurola, that the ruling of the trial court was right, that the telephonic communication alleged to have been received by the officer, was a "priviledge communication", as to which he could not be cross examined, and second; that the search was justified by what the officer saw.

The second will be reserved for consideration under assignment (g) herein, urging that under the holding of this court, in the Silverthorn Lumber Co., Boyd, Gouled, Amos, and that line of cases, the testimony of the officer as to what he observed in this case, was not admissible unless and until "reasonable cause" had been affirmatively proved to justify his attempt to intercept the defendant on the public highway.

SUB-POINT—(a) The telephonic communication was not a "privileged communication", in this case under the rule of the Carroll case.

SUB-POINT—(b) If the telephonic communication was "privileged", the privilege was waived by the government and the officer, by having him, neither claiming it, to testify, in part, to the transaction.

On these points we respectfully invite the attention to the dissenting opinion of the presiding Judge of the appellate court. (R. p. 62).

The facts are few and simple. The officer testified, in proof of his authority to make the seizure, that he received a telephone message that defendant Segurola was approaching the town of Carolina, where the policeman was, in a Buick automobile transporting liquors in violation of the law. As a result of this information he took a Ford car

and went to meet Segurola and attempted to intercept him on the highway. It is evident that such attempted action on the part of the officer was justified as a matter of law, there being no search warrant, only in the event that the telephonic communication was from such a person, and was of such a character, as to constitute "probable cause" as defined by this court in the rule in the Carroll case at page 154. At the trial this officer was not entitled as a matter of law to testify as to what the defendant Segurola did at the time the officer attempted to stop him and later, unless and until the basis for testimony of this character had first been laid by a sufficient affirmative showing of "probable cause" resulting from the reliability of the sender and the content of the alleged telephone message.

Arguing subpoints (a) and (b) together leaving point 2 for a moment, we urge that the communication was not so privileged as this proposition as to their nondisclosure can be invoked in a criminal case, involving constitutional rights of an accused, and especially so since this court has laid down the rule in the Carroll case. It is to be noted that in sustaining the proposition of nondisclosure, the majority opinion in the case, except that of Re. Quarles, 158 U. S. 158 U. S. 532 cites cases of a civil nature in support of its holding that such communications being confidential, are privileged and cannot be disclosed. WE THINK THAT THERE IS AN IMPORTANT DISTINCTION TO BE DRAWN IN THE APPLICATION OF THE PRINCIPLE IN CIVIL SUITS AND CRIMINAL ACTIONS INVOLVING CONSTITUTIONAL RIGHTS OF THE ACCUSED. THAT WHEN THE PRINCIPLE OF THE NONDISCLOSURE OF PRIVILEGED COMMUNICATIONS, WHETHER BASED UPON LAW OR PUBLIC POLICY, MEETS WITH THE CONSTITUTIONAL RIGHTS OF AN ACCUSED, THE FORMER MUST YIELD.

In Re. Quarles supra, asserts only, the constitutional right of a citizen to give information of a violation of the law. That right is nor questioned nor is this point involved in this case. (R. p. 61). No criminal case is cited except the Quarles case, not applicable, not in point.

Subpoint (b). If the privilege existed, it was waived by having the police officer to testify in part as to the

transaction. We relied chiefly upon King vs. U. S. 112 Fed. (C. C. A.) 988-997. A codefendant became a witness for the prosecution, and upon cross examination he was asked to state, what inducements, if any, were offered him to testify. The trial court sustained the objections of the district attorney on the ground that the communication was privileged and confidential. A conviction followed and in reversing the case said:

> "In this case we do not think that there is any necessity to approve or dispute the proposition cited from Roscoe, nor to determine how far the public policy shuts the mouths of witnesses in regard to state secrets can safely be applied when it conflicts with the constitutional right every person tried in the courts in the United States to have a fair and impartial trial. However the main proposition may be, we are clear that conversation of government detectives and other witnesses, with the purpose of inducing and influencing the evidence of such witnesses do not rise to the dignity of state secrets, and when a witness so induced appears on the stand and testifies, he may be cross examined as to any and all inducements made to him on the part of any one in connection with his evidence; and we think it would be intolerable for the government's agents to be allowed to give inducements, and not have the same freely exposed on the witness stand, so as to inform the court and the jury as to the proper weight of the evidence given." (Opinion at page 185)

In Steen vs First National Bank 298 Fed. (C. C. A.) 37-44 For the Court Judge Sanborn said:

> "The owner of the privilege of preventing disclosure of confidential communications cannot, after testifying to, or about them, or to, or about any substantial part of them without claiming the privilege, invoke that privilege to prevent other parties to the communications from testifying to them. He cannot by his silence lay down a shield of his privilege, and assail another with the sword of his

testimony to the privileged communications, and when his adversary essays to defend himself, or to attack him with his version of the testimony of other parties or witnesses to such communications, again seize the shield of his privilege and shut out all testimony as to the confidential communications but his own. He has waived his privilege and such waiver is in no sense contrary to public policy; indeed it is in the interest of truth and justice."

28 R. C. L. p. 430; People vs Molineux, 168 N. Y. 264-333, 61 N. E. 286, and other cases cited in the opinion mentioned.

The C. C. A. in its opinion (R. p. 61) stated the last mentioned case was an authority for the government for therein it appears that the privilege having been waived, it therefore existed. We cited it to show that it could be waived and was considered waived where the witness, owning the privalege, testified in part as to the matter, as was done in the instant case. If it could be waived in a civil action, it could be in a criminal trial, granting but not believing that the communication in the instance case was privileged and could not be withheld under the circumstances in this case.

We think that it would create an intolerable situation if policemen and enforcement agents could stop and search automobiles of citizens, and whether they found liquors or not, could justify their action by taking the witness stand and saying that they had received a telephone message, without compelling them to be more specific under cross examination, especially in cases like the instant case, where it is of fundamental importance to ascertain whether the search was within the rule stated in the Carroll case.

Not to do so, would result in opening wide the door to easily imagined abuses. As we view the decision of the C. C. A. on this point, the question of "probable cause" could not be passed upon by the jury or the court, for the facts upon which it was supposed to be based, would be locked within the breast of the officer. It therefore results that "probable cause" laid down in the rule in the Carroll case, is withdrawn from judicial consideration, both as to whether the supposed facts in reality existed, and as to the suf-

ficiency of the facts to consitute probable cause, both being left, without restraint or control, to the judgment and honesty of enforcement agents.

If the ruling be correct, as the C. C. A. said it was, a malicious person by calling an enforcement officer, could subject all such persons as he pleased, to the humiliation of having their automobiles searched. Or not maliciously, a suspicious person could bring the same about upon what he might regard as "probable cause" or even a suspicion. Policemen and enforcement officers could search whom they willed, and to justify themselves only say that they had received telephonic information. They could not be contradicted and if the statement were entirely false they could not be punished. The holding amounts, in practice, to a repeal of the constitutional restraint.

POINT 2.—Reversible error was committed in the proceedings identifying the liquors and attempting to prove they were of a character prohibited by law.

We do not urge that this is an error affecting the public interest to the extent that, in itself, the court should take jurisdiction to correct it, but that having taken jurisdiction as to other errors affecting the public interest, this court would proceed to consider and correct this alleged error.

As to this, we allege that reversible error was committed. (R. p. 40) The chemist stated that:

> "To determine its fitness for beverage purposes, I made quite a good analysis which included *almost all* of the things which might be expected to be in it." (Italics ours)

At p. 41 when asked if he made an analysis he replied: "Yes, I made an analysis for wood alcohol." At page 42 he states the kind of analysis ha makes, but it is clear that he was testifying as to the analysis he customarily makes, or that should be made, not to the one he made of the sample. It is evident that one made not seeking the presence of all the ingredients that might be used is not one sufficient to enable a witness to testify that the liquor is fit for beverage purposes. This sample may have been, but it was not proven. We think that a district attorney should be held strictly to prove that the liquor offered in evidence is within the definition provided by Congress.

We call attention to a statement of the trial judge at this important point in the case, (R. p. 41). "The Court It is the kind of whiskey as branded". To that moment no one had testified that the liquor in the bottle was whiskey. We know that a federal trial judge is allowed great latitude in commenting upon the evidence. We know of no case where he has been allowed to testify as a witness. When we attempted to insert an objection at this statement, we were not even permitted to complete the objection. (R. p. 41). The court must have been aware that courts had decided that testimony that the liquor is "whiskey" is sufficient proof of the alcoholic content and that it is fit for beverage purposes. Immediately after the annotation of our exception to the statement made by the court, he then proceeded to ask the question, leading the witness:

"Does the bottle contain whiskey?" Of course the witness answered "Yes." "He could not do otherwise without contradicting the Court. We think that the Court here became the advocate (Wallace vs. U. S. 291 Fed. (C. C. A.) p. 973; Starr vs. 153 U. S., 614; Shaffer vs. West Tenn. Co. (C. C. A.) 271 Fed. 820; Sandals vs. U. S. 213 Fed. 569).

This incident goes away beyond any thing condemned in these decisions.

In the same connection, when we examined the witness as to his knowledge as to this matter concerning which he testified as an expert, he was not allowed to answer our question, although the district attorney did not interpose any objection.

Q. Just what is the difference? (Between brandy and whisked).

> "The Court.—I do not think that a man could described it. I can tell the difference and I have no doubt that you can, but as to describing it, I do not think any man could described it. How can you describe the difference between two flowers? It is something that cannot be described".

This was an error, of fact and of law. Of law, in not allowing the question, especially when the district attorney had interposed no objection, and the witness had not said

that he could not answer it. It is not a fact, for an expert as this witness had said he was, could tell the difference, or ought to have been able to tell the difference, as easily as a botanist could tell the difference between a violet and a sun flower.

No objection appears in the record to this statement and ruling, but we ask the court to consider it as error. It may at least be considered in connection with other parts of the incident as to which exceptions are noted, on the point as to whether the court had become the advocate, and we respectfully insist that no conviction should be allowed to stand when an occurrence like the above takes place in the presence of the jury.

THE APPELLATE COURT DID NOT PASS UPON THIS POINT, although pressed upon its attention as a sub-point under our (R. pp. 39-40) assignment of errors containing this part of the record and assigning error thereon. See Petition for rehearing, (R. p. 68) and was one of the grounds for our petition for a rehearing.

> (g) In deciding and holding that independently of the alleged telephone message, the facts observed by the officer making the search and seizure, were sufficient to justify the search and seizure of the liquors and their admission as evidence under the rule in Carroll vs. U. S. 267 at p. 154.

POINT 1.—The facts referred to were not admissible as evidence.

POINT 2.—If the facts were admissible they were insufficient under the rule in the Carroll case.

POINT 1.—We understand that the net result of the rulings of this Court in Weeks vs. U. S. 232 U. S. 383; Amos vs. U. S. 255 U. S. 313; Gouled vs. U. S. 255, 303; Boyd case, 116 U. S. 623; Adams vs. New York, 192 U. S. 585; Silverthorn Lumber Co., and that line of cases it that evidence obtained in violation of law is not admissible. As said in Silverthern Lumber Co. vs U. S. 251 U. S., at page 391,

> "The proposition could not be more nakedly stated. It is that although of course its seizure was

> an outrage which the government now regrets, it may study the papers before it return, them, copy them, and then use the *knowledge* it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, not any advantages that the government can gain over the subject of its pursuit by doing the forbidden act. (Italics ours).

Before the conduct of the defendant Segurola, became admissible as evidence the government was called upon to show the authority of the officer to intercept the defendant on the highway. We contend that what the officer did and what Segurola did was admissible as evidence at the trial only if and when it was shown that the telephone message was of such a character as to its contents, and from a person of such responsibility as to have furnished "probable cause" for the officer, being a reasonably prudent man, to believe that a crime was being committed. Then as a condition precedent, the government should have shown affirmatively that "probable cause" as defined in the Carroll case, existed. The government failed on the direct evidence to do so, all that was shown in this regard was an alleged telephone message that liquors were being transported by defendant. If there had been no cross-examination attempted on the ponit, we urge that the showing of "probable cause" was insufficient—that it was not shown, and there being no search warrant, the officer was without legal authority to attempt to intercept the defendant on the public highway or to follow him and arrest him. After the direct testimony on this point the following transpired. (See Court's opinion, R. p. 60).

CROSS-EXAMINATION

Q—1. Now you have stated that you received confidential telephone information that there was a car coming with liquor, did you not? Yes, sir.

Q—2. Who gave you that information?

Mr. González (Assistant U. S. Attorney). I object as they are secrets of the police force, which

should not be stated in a court of justice, and the stating of the source of such information would be against public policy.

The Court: The objection is sustained.
Mr. Mestre: I take an exception.

(Immediately following the C. C. A. says: "This ruling is right. Vogel vs. Gruaz, 110 U. S. 311. In Re. Quarles, 158 U. S. 532 and citing other cases.

It is urged that this ruling is sustained as being correct, independently of what the defendant did as observed by the officer. That it is a ruling that in effect takes the question of "probable cause" as a question of fact and of law, out of the courts, for no evidence is to be disclosed which would make it possible for the jury to pass upon the truthfulness of the fact or for the court to pass upon the sufficiency of the facts supposed to furnish "probable cause". The result is that "probable cause" is a question solely for enforcement officers to decide and their decision cannot be revised or reviewed by the courts because the facts are not to be disclosed; there would be no way to punish anybody nor to demand redress in damages. As we thus view it, the Constitutional guaranty, in such cases, become a pure nullity.

It follows that there having been no authority for the arrest and seizure shown, the seizure was illegal and the liquors were improperly admitted as evidence, as held by the presiding Judge of the C. C. A.

POINT 2.—If the facts were admissible they were insufficient under the rule in the Carroll case.

To determine this, as the sufficiency of the telephone message is not shown, the facts which occurred, must be entirely disassociated from what the officer is supposed to have learned through the alleged telephone message, as though it did not exist. Do the facts here fall within the rule in the Carroll case. There the Court took judicial knowledge that Detroit was near the internation boundary line over which large quantities of contraband liquors were being introduced and over that particular highway. The officers knew that those defendants were "bootleggers" who

had previously agreed to deliver to these officers, disguised, a quantity of liquor. The officers knew the car they stopped as one used by defendants in illegally transporting liquors. These were facts personally known to the officers, not told them by some other person. In the instant case there is no question of an international boundary, nor of a place where liquors were habitually imported, or imported at all. Defendants are citizens on a highway within the United States, not known as "bootleggers" or persons who had ever violated the Volstead or any law, and the car was not shown to be one ever used in transporting liquors or used in violating any law.

The officer's version as to the acts of the driver of the car was that he passed him going fast. The car did not appear to have been carrying any load that seemed suspicious; Segurola did not appear to be intoxicated, nor did the other defendant; no liquors were seen nor was there the odor of liquors detected. Defendant went fast past an officer in uniform seated in another car on the road, **who made no sign for defendant to stop as he passed.** Later when the officer appeared in the town in front of Segurola, he backed his car and collided with a telephone post. Backing a car is a natural thing to do to get past another car in front.

From these facts it is urged that the officer had "probable cause" for believing that a crime was being committed in his presence. The officer refers to his state of mind in this particular as only a "suspicion". (R. p. 51) at "Cross examination by Mr. Mestre." By the officers own statement he did not act in making the seizure solely on the ground of what he observed but in part because of the telephone message.

"I seized this car because of confidential **information which I received by telephone,** and **also** the **manner** in which Segurola acted in passing me at high speed."

It is urged that the alleged telephone message, as a matter of law, was not available for consideration as a part of the basis for"probable cause",as it clear by was,as seen from the facts in the case and the above statement of the officer. It is inconceivable that the officer, if he were a reasonably prudent man, would have made the seizure on what he

observed, if he had not, in forming his judgment, depended upon the alleged telephone message.

> (h) In not deciding and holding that the liquors were erroniously admitted as evidence because of prejudicial error committed by the trial court in the proceedings had to identify the liquors and to prove that they were such as were in violation of law.

This assignment has been argued under POINT 2 of assignment (f). It was assigned as error in the C. C. A. (R. 40) under POINT 2 of the 4th. assignment. The C. C. A. did not pass upon the assignment and made no reference to it. (Opinion, R. p. 57) The failure to pass upon the point was one of the grounds for the petition for a rehearing. (R. 68).

> (i) As to the defendant, Manuel Santiago, independently of the foregoing errors assigned, the court erred in not holding that there was insufficient evidence to sustain a conviction against this defendant.

There is not evidence in this case upon which a conviction could properly stand against the defendant. The evidence as to him was that he was riding in the car where the liquors were concealed in the rear compartment and that they could not be seen unless the top of the compartment was lifted. This man was in Fajardo and wanted to come to San Juan where he lived, and seeing Segurola, who also lived in San Juan, passing in this car, requested a seat to San Juan. This defendant took the stand and said that he did not know that the liquors were in the car, and had no connection with the transaction. The judgment rests upon pure conjecture and suspicion. There is no evidence that excludes a reasonable hypothesis of innocence.

> "One walking along a public highway accepted an invitation to ride in an automobile which was at the time and without his knowledge carrying intoxicating liquors in which he had no interest and was in no way connected therewith, would not be guilty of transporting liquor." Payne vs State (Ind) 143 N. E. 283.

> "Where the defendant rode in his son's automobile with his son and there was no evidence that he had any knowledge of the whiskey being in the back of the car, or that he had any interest in it, cannot be found guilty of transportation."
>
> Ponton vs State (Tex) 261 S. W. 155.

The burden was on the prosecution to prove beyond a reasonable doubt that this defendant was interested in this transaction.

> "Where one rides in a truck in which whiskey was being transported, and who had no control over the truck or liquor and has no interest in the transportation, although he may have known that the truck contained liquor, he was not guilty of transportation or possession.
>
> People vs Perecino (Mich) 198 N. W. 902.

His association with a woman of accomodating virtue while he was in Fajardo was not shown to have any connection with these liquors. Here adultery exists only when one or both of the parties are married—it was not shown that either were, and if they were, he could not be a conviction therefor, under the Volstead Act, as appears to have been the case.

THE OFFICER WAS AN INSULAR POLICEMAN.

Referring to the illegality of the seizure and the consequent error of admitting the liquors as evidence, it will be noticed that neither in the trial court, nor in the C. C. A. was there any reference in connection with the proposition, that relief will be given by federal courts except when the seizure is made by federal officers. This is undoubtedly due to the fact of the knowledge of these courts of the peculiar situation existing in Porto Rico. This Court is doubtless aware that Congress, to relieve the United States Court here of its congestion caused by a large number of Volstead cases, has given the Insular courts concurrent jurisdiction to try Volstead offenders, and no fact is better known that in the greatest majority of these cases they are brought by the Insular Police, whether filed by them in the Insular or

Federal courts. There are some eight hundred of these policemen and about twelve or fifteen enforcement agents in the federal employ. It would be safe to say that nine tenths of these cases are brought by Insular policemen.

In the instant case the seizure was made on May 26th., and the officer states that on the following day the liquors were turned over to the Federal enforcement authorities, to bring this case. These policemen are engaged in the enforcement of a federal law over which the Insular courts have been given concurrent jurisdiction. Under such circumstances to deny relief in the U. S. Court for an illegal search made by a policeman when the case is brought to the federal court, would in practice in this jurisdiction, reduce the constitutional provision to a mere form of words, in the vast majority of cases as a practical matter depriving United States Citizens of the protection afforded by the 4th. and 5th. amendments specifically reenacted in our organic act.

CONCLUSION

The convictions in this case bring to mind the remarks of Mr. Justice McKenna is his dissenting opinion in the case of Carroll vs. United States, supra.

> "The damnable character of the "bootlogger's" business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. To press forward to a great principle by breaking through other great principles that stands in the way of its establishment ..... in short, to procure an eminent good by means that are unlawful, is as little consonant of private morality as to public justice."
>
> Sir William Scott, The Le Louis, 2 Dodson, Adm. 210, 257, 165 Eng. Reprint, 1464, 1479.

NOTE.—

We stated that in holding that the decision of the trial court was right, not permitting cross-examination of the officer as to the telephone message, the C. C. A. had cited civil cases except In Re. Quarles

we find that we are mistaken. One other criminal case is cited; Arnstein vs. United States 296 Fed. 946.

The cross examination was permitted. (See page 949—par. 8 of the opinion). Other cross examination was excluded not on the ground that it was privileged, but because it was not pertinent. This was improper cross examination. It had no tendency to contradict or explain what was brought out in chief and therefore was properly excluded. (Par. 9 opinion page 949).

In the principal case relied upon by the C. C. A. for its holding—Vogel vs. Grauz—110 U. S. 313 was a suit for damages, and the holding is that in *such a case* the communication will not be disclosed except *with the consent of the government*, (p. 315). In the instant case the officer nor the government claimed the privilege, and both consented when the government placed the officer on the witness stand and had him testify, in part to the transaction, both thus consenting and esstopping themselves from objecting to a full disclosure. Steen vs. First Nat. Bank, 298 Fed. at p. 41; King vs. U. S. 112 Fed. at p. 995; 28 R. C. L. p. 430.

Therefore petitioners pray that the convictions as to both be set aside for the errors herein assigned.

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IN THE SUPREME COURT OF THE UNITED STATES

(October Term 1927)

AGUSTIN SEGUROLA and MANUEL SANTIAGO, *Defendants, Petitioners,* vs. United States of America.	No. 195. On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

PETITIONERS' BRIEF ON THE MERITS

STATEMENT

On an information in two counts—the first for possession, the second for transporting liquor contrary to the National Prohibition Act—both defendants were found guilty. The defendant, Santiago, was fined $100.00 under the first count, $200.00 under the second count, and half the costs. The defendant, Segurola, was fined $200.00 under the first count, $300.00 under the second count and the other half of the costs. A motion for a new trial was denied, and on a writ of error, the Circuit Court of Appeals for the First Circuit, unanimously reversed the conviction of both defendants an the first count—that charging possession—, and by majority vote affirmed the convictions under the second count—that of transportation, (R. 56) Judge Bingham dissenting. (R. 54-56). A motion for a rehearing was not granted and on April 25th 1927, this Court granted a petition for a writ of certiorari (R. 57) which is now before the Court on the merits.

FACTS SHOWN BY THE GOVERNMENT'S EVIDENCE

This evidence is confusing if not contradictory and it is difficult to say with certainty what was proven by it. We submit the following as a fair statement, which contains important facts, as we see the evidence, not included in the statement of the majority opinion of the C. C. A. (R. 50).

Ceballos was, on May 26th, 1923, an officer in the insular police force and on duty at Carolina. On that day, as a result of alleged confidential information received by telephone to the effect that Segurola, in a Buick automobile, was coming from Luquillo to Loiza, Ceballos took a Ford car and went beyond a bridge three kilometers from Carolina, in the direction of Luquillo to intercept the coming Buick which was shown to be a Roadster. (R. 32). When he saw the Buick approaching he told his chauffeur to put his Ford across the road to intercept the oncoming car. "And when I saw the car coming I told my driver to turn my car around in order to block the other car." (R. 32). Which Ceballos does not testify was done, and the driver says was not done. The chauffer, Ismael Colon, a witness for the Prosecution at (R. 43) testified: "When we crossed the bridge we saw a car coming and he (Ceballos) told me 'Now you have got to get in the way of this car and stop it. x x x I told him that I could not do that because I was not going to destroy my car. Then the car that was coming passed us and he turned my car and we followed it'." No attempt was made to stop the Buick as it passed and it was not signaled to stop. (Ceballos R. 45). "No sir, I did not get out of the Ford car to make any signs to him to stop." The Buick was allowed to pass and was followed by the slower Ford to the town of Carolina. There the Buick, said to be running away, stopped and allowed itself to be overtaken. While stopped, the Ford with the officer approached it in an opposite direction. For some reason not clear in the record, Segurola put his car in reverse and collided with an electric wire post. The officer descended, opened a compartment in the rear of the Buick and found liquors, seized same, and arrested the defendants. The liquors could not be seen by any one seated in the car or elsewhere without opening the compartment in the rear. The defendants were taken to the police station. It does not appear that any proceeding under the local law were taken, and no the fol

lowing day, the defendants and the car and liquors were turned over to the Federal Enforcement Officers and this information was filed.

It is conceded that the officer had no search warrant or warrant of arrest. The facts are important since the C. C. A. held that these, independantly of the alleged telephone information, were sufficient to justify the search, seizure and arrest. (R. 52).

ASSIGNMENT OF ERRORS

We respectfully submit that the Circuit Court of Appeals erred in sustaining the conviction of both defendants on the second count (transportation) of the information:

1.—In not holding and deciding that the defendants were entitled to have a copy of the information upon demand therefor, as provided by section 2 of the Act of Congress of 1917, known as the Organic Act for Porto Rico and that they were therefore tried and convicted without due process of law.

2.—In holding that the defendants were not prejudiced by not having a copy of the information containing the charges upon which they were tried and convicted.

3.—In not holding and deciding that the automobile, there being no search warrant, was illegally searched and the liquors seized and admitted in evidence at the trial.

4.—In not holding and deciding that the liquors seized were erroneously admitted as evidence at the trial, there being no search warrant or warrant of arrest, because the United States showed no reasonable or probable cause on the part of the officer to believe that a crime was being committed in his presence, as laid down in the rule of this Court in Carroll vs. United States, 267 U. S. at page 154.

5.—In holding and deciding that the facts observed by the officer independently of the alleged telephone message were sufficient to give him reasonable or probable cause to believe that a crime was being committed in his presence, as laid down in the rule of this Court in the case of Carroll vs United States, 267 U. S. at page 154.

6.—In deciding and holding that the ruling of the trial court was right, that the alleged telephone message received by the officer that the defendant, Segurola, was approaching in an automobile transporting liquors, was a "privileged communi

cation" as to which the defendants could not cross examine the officer, he having testified for the government on direct examination, that he had received such a communicaion and acted thereafter upon such information, resulting in the search of the car and the seizure of the liquors.

7.—In not holding and deciding that it was error on the part of the trial court in refusing to permit defendants to cross examine the officer as to the source of his information alleged to have been received by telephone that the defendant, Segurola, was approaching in an automobile transporting liquors in violation of the law, the officer having testified as a witness for the government without objection on the ground of "privalege" that he had received such a message.

8.—In not deciding and holding that the liquors were erroneously admitted as evidence at the trial because of the statement made by the Court during the trial, in the presence of the jury that "*It is the kind of whiskey as branded*" and other prejudicial error committed by the Court in connection with the identification of the liquors and the government's evidence admitted to prove their alcoholic content and that they were fit for beverage purposes (R. 34, 35, 36).

9.—As to the defendant, Manuel Santiago, independently of the errors assigned affecting both defendants, the C.C. A. erred in not holding that the evidence was insufficient to sustain a conviction against this defendant.

ARGUMENT

The two errors alleged of fundamental importance and general concern in this case are; the failure of the trial court to direct a delivery to the defendants upon their request for same, of a copy of the information, in violation of section two of the Act of Congress of 1917, known as the Organic Act for Porto Rico, and the unlawful search and seizure of the automobile and admission of the liquors found as evidence in the trial, in violation of the principles of the 4th, and 5th, amendments of the Constitution of the U. S., reenacted in the Act of Congress of 1917, known as the Organic Act for Porto Rico, and as construed in such cases by the holding of this Court in reference to the search of automobiles in Carroll vs United States, 267 U. S. at page 154. This Court granting a hearing on these two grounds may proceed also to consider

errors committed at the trial, not in themselves matters of sufficient general interest, to be considered alone on certiorari.

Assignment One:

> "In not holding and deciding that the defendants were entitled to have a copy of the information upon their demand therefor, as provided by section 2 of the Act of Congress of 1917, known as the Organic Act for Porto Rico and that they were therefore tried and convicted without due process of law."

At the time of the arraignment and at the trial the defendants asked to be furnished with a copy of the charges, and took exceptions when refused them. (R. 5, 24).

Section 2 of the Act of Congress of 1917, known as the Organic Act for Porto Rico, in part is as follows:

> "That in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense, and to be informed of the nature and cause of the accusation, and *to have a copy thereof*, to have a speedy trial etc."

This provision is practically the Sixth Amendment of the Constitution of the U. S. with this phrase added: *"and to have a copy thereof."*

United States vs. Van Duzee, 140 U. S. 169, 172 is relied upon by the United States as authority that no obligation existed to furnish the copy. This case was a civil action to determine the right of the clerk to collect fees for such a copy, to determine which the Court construed the provisions of the Sixth Amendment, which, as stated, contains no express provision "to have a copy thereof" as does section two, above quoted.

The situation in Porto Rico, under the section mentioned, we think is like that which the Supreme Court in the Van Duzee case, said existed in capital cases as provided by Section 1033 of the R. S. mentioned in the opinion, providing specifically that in such cases the copy must be furnished.

In the instant case, when application for the copy was made and refused, the trial Judge said, "I know of no law

requiring the same." (R. 5). But the trial Judge evidently overlooked the statement of the Supreme Court, even under the situation in the Van Dusee case, at page 173. It said:

> "We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the government, and under the order the Clerk is entitled to his fee."

Therefore, the *authority* of the trial Judge to grant the application rested upon the above quoted language of the Court in the Van Dusee case, and the *obligation* to do so was imposed by the specific provision in Sec. 2 of the Act of Congress of 1917.

No enabling legislation appears to have been enacted providing what officer of the Government shall furnish the copy, there is no rule of the District Court. In the absence of both we think that the District Court of the United States in the Van Dusee case at page 574 of 41 Federal Reporter, correctly said:

> "Under the Code of Iowa, it is required, upon arraignment, that a copy of the indictment shall be furnished in every case. The common practice prevailing in the state aids the court in determining in what mode the constitutional provision shall be carried out."

So, Section 142 of the Code of Criminal Procedure of Porto Rico provides:

> "The arraignment must be made by the prosecuting attorney, which consists in reading the information to the defendant and delivering a copy thereof."

This provision was, and has been in force and has been the common practice for over twenty years in the Insular courts in Porto Rico, and was the common practice in the Federal Court here until with in the past four or five years, when it was discontinued. The Bar has made repeated demands for copies of informations and indictments without receiving them, to the great prejudice we believe, as in this case, of

persons accused in preparing their defense. We think that Congress, in including the words "and shall have a copy thereof" intended in all cases that the accused should have delivered to him free of cost a copy of the charges of which he stood accused in order that he might properly and seasonably prepare his defense, and the Bar has long desired a final ruling on the point.

NOT DECIDED BY THE C. C. A.

While not deciding the point, (R.50,52) the C. C. A. thought that were it to be decided it would have to be in accordance with the Van Duzee case. It seems to us that the C. C. A. overlooked the language employed by this Court in that case:

> "We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the Government, and under such order the clerk is entitled to his fee."

and the more important proposition of the constitutional right of an accused to be informed of the nature of the charge against him by having a copy thereof, as provided by Sec. 2 of the Organic Act. This was not before the court in the litigation mentioned of a civil character, to determine the right of a clerk to collect fees.

The denial referred to was prior to the year 1927. We find that Congress has further legislated concerning the matter. By Act No. 563 the 69th. Congress approved, on Jan. 22nd, 1927. "An Act to amend the Act of Feb. 11th, 1925 (43 Stat. at Large, p. 857, Sec. 2) which reads

> "Provided, that in each criminal case not provided in Sec. 1033 of the Revised Statutes of the U. S., the clerk shall furnish each defendant, upon his request, a copy of any information or indictment returned against him, the fees for said copy and the certificate thereto, at the rates provided for by law, to be taxed as costs but such fees shall not be demanded of any such defendant unless and until by order, judgment, or decree of the court the costs in the case are assessed against him."

This legislation clearly, in Federal courts in Continental U. S. establishes the right of the accused to a copy of the information and puts the situation on a par with what we contend it was under the provisions of section 2 of the Organic Act for P. R., containing the provisions of the Sixth Amendment of the Constitution and in addition thereto, "and shall have a copy thereof."

Assignment two.

> "In holding that the defendants were not prejudiced by not having a copy of the information containing the charges upon which they were tried and convicted."

The C. C. A., assuming that if error were committed in not delivering a copy of the charges when demanded held that the defendants were not prejudiced thereby and overruled our assignment of error under the authority of St. of 1919, 40 St. 1181 amending the Judicial Code directing the courts not to reverse for technical errors that do not affect the substantial rights of the parties.

We shall not cite cases that prejudice is presumed as a matter of law when error is shown.

The prejudice suffered in such cases would not probably be shown on the record. It would be suffered in hampering and crippling a defendant in the preparation of his case before the opening of the trial and might be of such a character as that it could not be shown in the record. How could it be known from this record what difficulties and embarrassment the defendants encountered and suffered before the trial began in the preparation of their defense because they were not fully and fairly apprised of the exact nature of the charges they were forced to meet.

Our point is that *the record does not show that the defendants were not thus prejudiced.*

At the arraignment they demanded a copy and at the trial again objected taking exceptions on both occasions at the Court's refusal. The demands were seasonable made.

We are contending for the recognition of a vital principle with the view of correcting what we believe to be the mistaken practice of the District court in refusing to deliver a copy of the charges.

Even should the District Court change the practice complained of by reason of the Act of Congress above mentioned, approved on Jan. 27th, 1927, this would not effect the error committed in this case of refusing a copy, if the right to have it existed under section 2 of the Organic Act for P. R., as we contend it does, and we respectfully submit that these defendants are entitled to take the benefit of their demand and exception seasonably made and taken.

Assignments three, four, six, and seven are as follows:

Three: In not holding and deciding that the automobile, there being no search warrant, was illegally searched and the liquors seized and admitted in evidence at the trial.

Four: In not holding and deciding that the liquors were erroneously admitted as evidence at the trial, there being no search warrant or warrant of arrest, because the United States showed no reasonable or probable cause on the part of the officer to believe that a crime was being committed in his presence, as laid down in the rule of this Court in Carroll vs United States, 267 U. S. at page 154.

Six: In deciding and holding that the ruling of the trial court was right, that the alleged telephone message received by the officer that the defendant, Segurola, was approaching in an automobile transporting liquors, was a "privileged communication" as to which the defendants could not cross examine the officer, he having testified for the Government on direct examination, that he had received such a communication and thereafter acted upon it, resulting in the search of the car and the seizure of the liquors.

Seven: In not holding and deciding that it was error on the part of the trial court in refusing to permit defendants to cross examine the officer as to the source of his information alleged to have been received by telephone, that the defendant, Segurola, was approaching in an automobile transporting liquors in violation

of the law, the officer having testified as a witness for the government without objection on the ground of "privalege", that he had received such a message.

We think that these assignments may be argued together under the following points.

POINT 1. There being no search warrant or warrant of arrest the search of the automobile and the seizure of the liquors were unlawful and their admission in evidence was error.

POINT 2. The refusal of the trial court to permit the defendants to cross examine the officer as to the source of his alleged telephone message was prejudicial error.

As to point one. The motion to suppress the liquors as evidence because they had not been properly identified and because the search of the automobile was unlawful, was denied and exception noted. (R. 37) The decision of the C. C. A. is that, independently of the information received by the officer, he had reasonable or probable cause to believe that a crime was being committed in his presence. This we leave for discussion under another assignment.

There is no need to argue the net result of the holdings of this court in Boyd vs United States, 116 U. S. 303; Silverthorn Lumber Co. vs U. S. 251 U. S. 319; Gouled vs U. S. 255 U. S. 303; Amos vs U. S. 255 U. S. 313 as to the use of unlawfully obtained evidence, and Carroll vs U. S. 267 U. S. at page 154, laying down the rule under which automobiles may be searched.

THERE BEING NO SEARCH WARRANT IT WAS INCUMBENT UPON THE GOVERNMENT TO JUSTIFY THE SEARCH BY SHOWING REASONABLE OR PROBABLE CAUSE ON THE PART OF THE OFFICER TO BELIEVE THAT A CRIME WAS BEING COMMITTED. This is attempted by showing a telephone message. This we contend was not done because we think that fundamental error was committed in connection with this evidence in not permitting the defendants to cross examine the officer as to the source of his information. (R. 16) AS THE LATER ACTIVITIES OF THE OFFICER WERE DUE EXCLUSIVELY TO

THIS ALLEGED MESSAGE, ITS EXISTENCE, SOURCE, AND CHARACTER SHOULD HAVE BEEN LEGALLY PROVEN TO BECOME AVAILABLE TO PROVE PROBABLE CAUSE.

BUT EVEN IN SUCH A CASE CAN IT BE DONE HERE WHEN IT IS EVIDENT THAT THE OFFICER WOULD HAVE SEEN NOTHING but for the alleged telephone message. Without this being properly proven, on the record he was a trespasser from his first attempt to intercept defendants.

PRESUMABLY THE OFFICER COULD HAVE SECURED A SEARCH WARRANT HAD HE BEEN ENTITLED TO IT.

By asking this court to take judicial notice of the laws of Porto Rico, we are able to call attention to the fact that at the officer's post—Carolina—there were both, a justice of the Peace and a Municipal Judge with authority to administer oaths and issue search warrants. The Carroll case is said to establish a distinction in regard to the search of premises and that of automobiles because in the great majority of cases to require a search warrant to search a swifty moving vehicle would result in exempting them from search as a practical matter for they would disappear before the warrant could be secured. But we do not think that the Supreme Court intended by its decision in the Carroll case to relieve enforcement officers from the obligation of securing a search warrant to search automobile under circumstances that permit it to be done, which we think existed in the instant case, and have such officers to precipitately rush off to search automobiles on questionable information without proceeding with that circumspection which indicates a due regard for citizens "lawfully within the country, entitled to use the highways" as said in the Carroll case.

In the instant case the officer after receiving the alleged telephone message, could have applied to a local judicial officer for a search warrant and presumably could have secured it in time. He went three kilometers to meet Segurola and not having stopped him, returned to Carolina and found him in the town. He might have sent some other policeman out to locate Segurola and keep him in view, while he remained in the town toward which the defendant was coming, to secure the search warrant. If the defendant had come into and left

Carolina before the warrant was secured the officer might have intercepted him by telephone or telegraph on ahead, on the authority of the search warrant. Apparently what happened here was what too frequently happens and that was the officer was little impressed with fundamental importance of the constitutional restraint prohibiting unreasonable searches and seizures. Ought it not to be held by the Courts that when the circumstances reasonably permit in such cases, officers must apply for and secure a search warrant, if the constitutional protection is to be strictly enforce, as has been held

Point 2. The refusal of the trial court to permit the defendants to cross examine the officer as to the source of the telephone message was prejudicial error. This point is closely related to the preceding one.

Little need be said by way of argument that has not been said by Judge Bingham in his dissenting opinion (R. 54, 55, 56). If the communication of the officer were privileged, whether the privilege belonged to him or the government we need not discuss, since his direct evidence was produced by the government and he testified in chief without asserting his privilege. Both waived it, if it existed. Steen vs. First National Bank 298 Fed. (C. C. A.) 37 44.

> "The owner of the privilege preventing disclosure of confidential communications cannot, after testifying to or about them, or to or about any substantial part of them without claiming the priviledge, invoke that privalege to prevent other parties to the communications from testifying to them. He cannot by his silence lay down the shield of his privalege and assail with the sword of his testimony to the privileged communications, and when his adversary essays to defend himself, or to attack him with his version of the testimony of other parties or witnesses to such communications, again seize the shield of his privalege and shut out all testimony as to confidential communications but his own. He was waived his privalege and such waiver is in no sense contrary to public policy; indeed it is in the interest of truth and justice."

28 R. C. L. p. 430; People vs Molineux, 168 N. Y. 264-333, 61 N. E. 286, and other cases cited in this opinion writen by Judge Sanborn. Also in principle, King vs U.S. 112 Fed. (C.C.A.) 988-997. In King vs. U. S. supra, the C. C. A. reversing the conviction below, said:

> In this case we do not think that there is any necessity to approve or dispute the proposition cited from Roscoe, nor to determine how far the public policy shuts the mouths of witnesses in regard to state secrets can safely be applied when it conflicts with the constitutional right every person tried in the courts of the United States to have a fair and impartial trial. However the main proposition may be, we are clear that conversation of government detectives and other witnesses, with the purpose of inducing and influencing the evidence of such witnesses do not rise to the dignity of state secrets, *and when a witness so induced appears on the stand and testifies, he may be cross examined as to any and all inductments made to him on the part of any one in connection with his evidence; and we think it would be intolerable* for the government's agents to be allowed to give inducements, and not have the same freely exposed on the witness stand, so as inform the court and jury as to the proper weight of the evidence given." (Opinion at p. 996) Italics supplied.)

and at page 995-6 the court states:

> "In the cross examination of witnesses in criminal cases a wide latitude is permitted. It is alway permissible to show interest, bias, and prejudice of the witness, and to inquire about any and every relevant and material matter in the controversy which in any way tends to throw light upon the feelings of the witness, or explains and makes clear his situation with respect to the defendant. x x x The proposition is elementary." (Citing cases.)

This language was employed in deciding whether a communication made to the United States attorney by a co-defen-

dant, testifying for the government, was privileged, as to what inducement had been offered for him to so testify.

The C.C.A. in this connection in the instant case, holds without qualification that an officer (witness) who has testified in chief as to communications alleged to have been received by him cannot be cross examined by the defendant.

> (R. 53) Q. "Now you have stated that you received confidential telephone information that there was a car coming with liquor, did you not?
>
> A. Yes, sir.
>
> Q. Who gave you that information.
>
> Mr. Gonzalez (Assistant U. S. Attorney) I object as they are secrets of the police force, which should not be stated in a court of justice, and the stating of the source of such information would be against public safety (policy).
>
> The Court: The objection is sustained.
>
> Mr. Mestre: I take an exception."

This ruling was right. The above from the C.C.A. opinion (R.53). The ruling is without qualification, and, we think is erroneous.

The cases cited in support of the ruling by the C. C. A. are mainly civil cases, suits for damage. In none of these was the constitutional rights of an accused before the court. In Vogel vs Grau 110 U. S. 313 cited in support by the C.C.A., an action for damages, the statement is made that in such cases such communications cannot be divulged *except with the consent of the government*. In that case the district attorney, a witness for the plaintiff, had not testified in chief as to the communication at the instance of the government as in the instant case. In Re Quarles 158 U. S. 532 also cited by the C. C. A. asserts the constitutional right of a citizen to give information of a violation of the law, a question not here in issued. One other criminal case cited: Arhstein vs U. S. 296 Fed. 946, the cross examination was permitted. (See page 949, par 8, opinion) Other cross examination was excluded, not because it was privileged, but because it was not proper cross examination the court saying that it had no tendency to contradict or explain what was brought out in chief. See paragraph 9 of the opinion, page

949. We have not available all the civil cases cited by the C.C.A. in support of this ruling. As to these the principle as we understand it, was not adjudicated.

We think that there is an important distinction to be drawn in the application of the principle of non disclosure of such communications in civil actions and in criminal actions involving constitutional rights of an accused that when the principle of non disclosure of "privaleged communications" whether based upon law or public policy, meet with constitutional rights of the accused, the former must yield in any case it seems that the privalged was waived both by the government and the officer.

We are at a loss to understand the reasoning of the majority opinion (R. 53) where it concludes that Steen vs. First Nat. Bank, supra, an authority against our contention that if the communication was privaleged, it was waived. The opinion says

> "That was a suit for malicious prosecution; it appeared that the bank officials, through whom the plaintiff claimed a groundless prosecution had been instituted, had, at the preliminary examination of Mrs. Steen, voluntarily testified to the confidential communications made by them to the prosecuting officer. Under these circumstances, that learned court held that the privalege was personal and had been waived. But the court recognizes (298 Fed. 40) that if the privalege had been seasonably claimed it would have been the duty of the court to sustain it. The case is, therefore, on analysis of the facts, an authority for the government and not for the defendants, in the instant case."

We cited this case in support of our contention that if the privalege existed, it had been waived because the officer voluntarily testified if the privalege was his, and the government put him on the stand and brought out the testimony as to the communication, if the privalege belonged o the government, which facts parellel those of the voluntary evidence offered by the bank officials at the preliminary hearing referred to in the Steen case, because of which the Court held that the privalege had been waived. We cannot understand then, why the Steen case does not support our contention of

a waiver of the privalege, instead of being against us, as stated in the opinion of the C. C. A.

THIS RULING IS OF FAR REACHING EFFECT.

We think that it would create an intolerable situation if policemen and enforcement agents could stop and search automobiles of citizens and whether they found liquor or not, could justify their action by taking the witness stand and saying that they had received a telephone message, without compelling them to be more specific under cross examination, especially in cases like the instant case, where it is of fundamental importance to ascertain whether the search was within the rule of the Carroll case.

Not to do so, would open wide the door to easily imagined abuses. As we view the ruling of the C. C. A. on this point, the question of "probable cause" could not be passed upon by the jury, for the facts upon which it would be supposed to rest, would be locked within the breast of the officer. There would be no practical way even to dispute them. It therefore results that "probable cause" as laid down in the Carroll case, is withdrawn from judicial consideration, both as to whether such facts really existed and as to their sufficiency, both being left, without restraint or control to the judgment and truthfulness of policemen and enforcement agents. A jury would have no opportunity to pass upon the facts alleged to constitute "probable cause." The need of doing so in the interest of justice becomes of more importance than ever since the decision of this Court in the Carroll case. As to such facts a trial by jury is denied defendants, and the constitutional guaranty against unlawful searches in such cases becomes a nullity.

Assignment Five.—In holding and deciding that the facts observed by the officer, independently of the alleged telephone message, were sufficient to give him reasonable and probable cause to believe that a crime was being committed in his presence, as laid down in the rule of this Court in the case of Carroll vs. United States, 267 U. S. at page 154.

The C. C. A. holds that not considering the telephone message, what the officer saw thereafter gave him "reasonable and probable cause" to believe that the defendant was committing a crime in his presence. (R. 52) We must differ with

the C.C.A. as to what the facts were under the evidence, which appear stated in the opinion. The evidence of the prosecution is confusing. We think that too little of the evidence is stated by the C. C. A. and that a clearer statement is to be found under our opening statement herein. On this point this Court will have to say what was proved and whether the facts shown constituted "reasonable or probable cause" without the aid of the telephone message.

But at the outset we wish to emphasize this point. THAT THESE FACTS WERE NOT AVAILABLE to the government in showing probable cause unless and until it first showed, affirmativly, by legal evidence, without reversible error, the fact and the sufficiency of the alleged telephone message. Every thing that the officer saw thereafter was a direct consequence of that message. Was it shown to be such an one as justified him to stop or to attempt to intercept the car of a citizen going a long a public highway. Until the government had shown, as stated, a proper communication furnishing probable cause was not the officer a trespasser from the beginning in his attempt to intercept the defendants three kilometers away where he went to meet and to intercept them? Is not the principle the same, where an officer without a search warrant or other right enters a house and *after committing a trespass*, observes a violation of the law. Such evidence is inadmissible under the holdings of this court as we understand them. If the cases are parallel how could what the officer saw be considered in this case at all to determine probable cause, if it should be held that the majority ruling of the C. C. A. is wrong fundamentally in excluding the cross examination as to the source and sufficiency of the alleged telephone message. If that be so, then the telephone message is out of the case and the officer went forth to intercept a citizen without authority and was a trespasser *ab initio*. One event followed another, the latter as a consequence of the former, beginning with an unlawful act. The supposed telephone message might not have existed at all, or it might have been anonymous, in which case the officer would not have been justified in intercepting a traveller, or it might have been from some other unreliable source. The defendants on the direct examination could not anticipate that the trial judge would refuse to allow cross examination as to the source of the message. We then urge that the message is out of the

case, and that what occurred thereafter the officer had no right to see and that he was a trespasser from the beginning until the close of his activities resulting from the telephone message.

BUT THE OFFICER DID NOT RELY UPON WHAT HE SAW EXCLUSIVELY, TO MAKE THE SEARCH.

That is evident from his statement and from what the trial judge understood

> "I seized the car because of confidential information which I received by telephone and also the manner in which Segurola acted by passing me at high speed." (R. 44)

The Court: (R. 44)—I am satisfied that this chief of police had a right, by reason of the confidential information received by him and by reason (of) the suspicious actions of the defendant, to believe that a law was being violated and to search the car, and in my opinion that the search of the car was legal, and the motion (to suppress the evidence) will be overruled."

BUT FOR THE SAKE OF ARGUMENT LET IT BE ASSUMED THAT THE OFFICER RELIED WHOLLY UPON WHAT HE SAW AND THAT THESE FACTS ARE AVAILABLE IN ORDER TO DISCUSS WHETHER, TAKEN ALONE, THEY SHOW PROBABLE CAUSE, AS STATED BY THE C. C. A. WHERE IT IS SAID IN THE OPINION

> "On the record there was, therefore, apart from any confidential communication, abundant evidence of probable cause for the seizure under the principles of the Carroll case, supra." (R. 52)

We think that after considering the evidence for the prosecution which is not clear and at places contradictory and at one point incredible, that the facts were briefly these: That after receiving the communication the officer took a Ford car driven by its its chauffer and went 3 kilometers out of the town of Carolina on the highway and at a point beyond a bridge to meet the defendant's Buick roadster. When this car was seen coming the officer told the chauffer to put his

car across the road to intercept the oncoming car which the chauffer did not do; that the defendant passed not having been signalled to stop by the officer who was in uniform, and it went on, followed by the slower Ford, to the town of Carolina, where the Buick stopped. The Ford later by a circuitous route approached the Buick from the front. Segurola for some reason, put his car in reverse and backed into an electric light post. The officer then alighted from the Ford, went to the Buick and searched it and found the liquors, arrested the occupants of the Buick, took them to the police station, and the following day delivered the liquors and the case to the Federal officers and this information was filed. See our statement herein with reference to the record. Reading (R. 52) it is observable that the C. C. A. did not consider important testimony but concluded that Segurola tried to run down the Ford three kilometers from the town and thereafter ran away, and thought that these facts in themselves were sufficient to give the officer reasonable cause to believe that Segurola was transporting liquors. While not admitting that these two facts are shown by the record, fairly considering all the evidence, we do not think that they are sufficient. Did Segurola try to run down the Ford? The translation of the officers evidence (R. 44) shows vagueness and even contradiction. Reading his evidence under the cross examination he states:

"I have stated that I was suspicious because he threw his car against my car and because he ran away at great speed." This in English means that there was a collision. Then he says: "By saying he threw his car against mine I mean he tried to have a collision with my car and if it had not been for my chauffeur, he could have done so" x x x "He tried to bump his car against mine but he had no collision because we let him pass. *From his attitude* he tried to bump his car against mine. We had to let him go by and he ran away. I say he ran away because he was driving at great speed."

> The officer testified (R. 32) "I told my driver to turn my car around in order to block the other car. It was the Buick driven by Segurola that was coming."

There was no evidence that the Ford got in the way of the Buick on the contrary the chauffer of the Ford testified (R.43)

"When we crossed the bridge we saw a car coming and he (officer) told me: 'Now you have got to get in the way of this car and stop it. x x x "I told him that I could not do that because I was not going to destroy my car. Then the car that was coming passed us and he turned my car and we followed it." (R.45) (Officer).

"No sir, I did not get out of the Ford car to make any signs to stop him."

(R. 45) "I was dressed in uniform. I tried to get in his way and make him stop. Yes, sir, there are many Fords turning around on the public roads every day. Segurola should have thought that I was different from any other Ford because he saw my uniform as he was going past because he passed by my side and had to see me."

In view of the entire evidence considered together we think that it is not shown that the Buick collided with, or attempted to run down the Ford as it passed.

Does the record show that the Buick was running away? The officer testified (R. 44): "I say he was running away because he was driving at great speed." If Segurola was running away is it conceivable that he would have stopped at Carolina and allowed the officer to overtake him as he did. He would have continued through the town on his journey as fast as possible. He probable had not noticed an officer in the car as he passed. Certainly he, far from "running away", had no throught of pursuit. It is a matter of general knowledge that a Buick roadster is a faster car than a Ford.

Taking the record as a whole we doubt if it could be correctly found that the defendant tried to run down the Ford and the defendant was running away.

The question then is whether the proven facts as they may be found by this court to be, furnish reasonable and probable cause apart from the telephone communication, and assuming that such facts may be considered in spite of the fact that the telephone communication was not properly proven as we contend.

The facts, assuming them to be as stated by the C.C.A., are far different from those which existed in the Carroll case. There the Court took judicial knowledge that great

quantities of liquor were being introduced from Canada and taken to Detroit across an international boundary. The enforcement officers had *personal* knowledge that the defendants were boot leggers and that the car searched was one habitually *used for transporting liquors*. *In the instant case* the officer had no previous personal knowledge of this matter, there is no question of an international boundary, nor is there in the record or elsewhere anything to show that this place was one where liquor was introduced or transported. There is no evidence that the officer knew the defendants to be bootlegger or that the Buick was a car in which liquors were transported.

It is urged that no facts could be found under the evidence in the instant case approaching those in the Carroll case or could be said, without the telephonic communication, to have furnished "probable cause" nor if consided together with that communication.

The rule laid down in the Carroll case (page 149) seems to require that the facts must be within the knowledge of the officer. It is there said:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably *arising of circumstances known to the seizing officer*, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid." (Italics supplied.)

In the instant case the officer had no knowledge of the matter when he first attempted to intercept the defendants. U. S. vs Allen et al 16 F. (2nd) 320 holds that the facts there did not come within the rule in the Carroll case and we think them to have been stronger that those in the instant case. If the search and seizure were unlawful it follows that the arrest made thereafter was unlawful.

Assignment Eight.

> "In not deciding and holding that the liquors were erroneously admitted as evidence at the trial because of the statement made by the Court during the trial, in the presence of the jury that "IT IS THE KIND

> **OF WHISKEY AS BRANDED" and other prejudicial errors committed by the Court in connection with the identification of the liquors and the government's evidence admitted to prove their alcoholic content and that they were fit for beverage purposes."** (R.34,35,36.)

We do not urge that this is an error affecting the public interest to the extent that, in itself, the court should take jurisdiction to correct it, but that having taken jurisdiction as to other errors affecting the public interest, this court would proceed to consider and correct this alleged error.

As to this, we allege that reversible error was committed (R. 43). The chemist stated that:

> "To determine its fitness for beverage purposes, I made quite a good analysis which included *almost all* of the things which might be expected to be in it." (Italics ours)

At p. 34 when asked if he made an analysis he replied: "Yes, I made an analysis for wood alcohol." At page 36 he states the kind of analysis he makes, but it is clear that he was testifying as to the analysis he customarily makes, or that should be made, not to the one he made of the sample. It is evident that one made not seeking the presence of all the ingredients that might be used to render it unfit is not one sufficient to enable a witness to testify that the liquor is fit for beverage purposes. This sample may have been, but it was not so proven. We think that a district attorney should be held strictly to prove that the liquor offered in evidence is within the definition provided by Congress.

We call attention to a statement of the trial judge at this important point in the case, (R. p. 35). "The Court. It is the kind of whiskey as branded." To that moment no one had testified that the liquor in the bottle was whiskey. We know that a federal trial judge is allowed great latitude in commenting upon the evidence. We know of no case where he has been allowed to testify as a witness. When we attempted to insert an objection at this statemen, we were not even permitted o complete the objection. (R. p. 35) The court must have been aware that courts had decided that testimony that the liquor is "whiskey" is sufficient proof of the

alcoholic content and that it is fit for beverage purposes. Immediately after the annotation of our exception to the statement made by the court, he then proceeded to ask the question, leading the witness:

"Does the bottle contain whiskey?" Of course the witness answered "Yes." "He could not do otherwise without contradicting the Court. We think that the Court here became the advocate (Wallace vs. U. S. 291 Fed. (C. C. A.) p. 973; Starr vs. 153 U. S., 614; Shaffer vs. West Tenn. Co. (C. C. A.) 271 Fed. 820; Sandals vs. U. S. 213 Fed. 569).

This incident goes away beyond any thing condemned in these decisions.

In the same connection, when we examined the witness as to his knowledge as to this matter concerning which he testified as an expert, he was not allowed to answer our question, although the district attorney did not interpose any objection.

Q. Just what is the difference? (Between brandy and whisked)

> "The Court.—I do not think that a man could described it. I can tell the difference and I have no doubt that you can, but as to describing it, I do not think any man could described it. How can you describe the difference between two flowers? It is something that cannot be described." (R. 35).

This was an error, of fact and of law. Of law, in not allowing the question, especially when the district attorney had interposed no objection, and the witness had not said that he could not answer it. It is not a fact, for an expert as this witness had said he was, could tell the difference, or ought to have been able to tell the difference, as easily as a botanist could tell the difference between a violet and a sun flower.

No objection appears in the record to this statement and ruling, but we ask the court to consider it as error. It may at least be considered in connection with other parts of the incident as to which exceptions are noted, on the point as to whether the court had become the advocate, and we respectfully insist that no conviction should be allowed to stand when an occurrence like the above takes place in the presence of the jury.

THE APPELLATE COURT DID NOT PASS UPON THIS POINT, although pressed upon its attention as a subpoint under our (R. pp. 39-40) assignment of errors containing this part of the record and assigning error thereon. (See Petition for rehearing.) (R. p. 68) and was one of the grounds for our petition for a rehearing.

Assignment Nine.

As to the defendant, Manuel Santiago, independently of the errors assigned affecting both defendants, the C. C. A. erred in not holding that the evidence was insufficient to sustain a conviction against this defendant.

There is no evidence in this case upon which a conviction could properly stand against this defendant. The evidence as to him was that he was riding in the car where the liquors were concealed in the rear compartment and that they could not be seen unless the top of the compartment was lifted. (R. 44). This man was in Fajardo and wanted to come to San Juan where he lived, and seeing Segurola, who also lived in San Juan, passing in this car, requested a seat to San Juan. This defendant took the stand and said that he did not know that the liquors were in the car, and had no connection with the transaction. The judgment rests upon pure conjecture and suspicion. There is no evidence that excludes a reasonable hypothesis of innocence.

> "One walking along a public highway accepted an invitation to ride in an automobile which was at the time and without his knowledge carrying intoxicating liquors in which he had no interest and was in no way connected therewith, would not be guilty of transporting liquor." Payne vs. State (Ind) 143 N. E. 283.

There is no evidence that he knew that the liquors were in the car and if there were, there must have been shown participation in the transportation. Neither is shown.

> "Where the defendant rode in his son's automobile with his son and there was no evidence that he had any knowledge of the whiskey being in the back of the car, or that he had any interest in it, cannot be found guilty of transportation."
>
> Ponton vs. State (Tex).
> 261 S. W. 155.

"Where one rides in a truck in which whiskey was being transported, and who had no control over the truck or liquor and has no interest in the transportation, although he may have known that the truck contained liquor, he was not guilty of transportation or possession."

People vs. Perecino (Mich.) 198 N. W. 902.

His association with a woman of accomodating virtue while he was in Fajardo was not shown to have any connection with these liquors. Here adultery exists only when one or both of the parties are married—it was not shown that either were, and if they were, he could not be a conviction therefor, under the Volstead Act, as appears to have been the case.

THE OFFICER WAS AN INSULAR POLICEMAN

Referring to the illegality of the seizure and the consequent error of admitting the liquors as evidence, it will be noticed that neither in the trial court, nor in the C. C. A. was there any reference in connection with the proposition, that relief will not be given by federal courts except when the seizure is made by federal officers. This is undoubtedly due to the knowledge of these courts of the peculiar situation existing in Porto Rico. This Court is doubtless aware that Congress, to relieve the United States Court here of its congestion caused by a large number of Volstead cases, has given the Insular courts concurrent jurisdiction to try Volstead offenders, and no fact is better known that in the greatest majority of these cases they are brought by the Insular Police, whether filed by them in the Insular or Federal courts. There are some eight hundred of these policemen and about twelve or fifteen enforcement agents in the federal employ. It would be safe to say that nine tenths of these cases are brought by Insular policemen; here is a working agreement between police officials and Federal authorities.

In the instant case the seizure was made on May 26th., and the officer states that on the following day the liquors were turned over to the Federal enforcement authorities, to bring this case. These policemen are engaged in the enforcement of a federal law over which the Insular courts have been given

concurrent jurisdiction. Under such circumstances to deny relief in the U. S. Sourt for an illegal search made by a policeman when the case is brought to the federal court, would in practice in this jurisdiction, reduce the constitutional provision to a mere form of words, in the vast majority of cases as a practical matter depriving United States Citizens of the protection afforded by the 4th. and 5th. amendments specifically reenacted in our organic act.

However, our understanding is, that under the facts herein and errors assigned, the foregoing proposition not material. Whether the officer be regarded as a Federal official or otherwise, probable cause would have to be shown.

CONCLUSION

The convictions in this case bring to mind the remarks of Mr. Justice McKenna is his dissenting opinion in the case of Carroll vs. United States, supra.

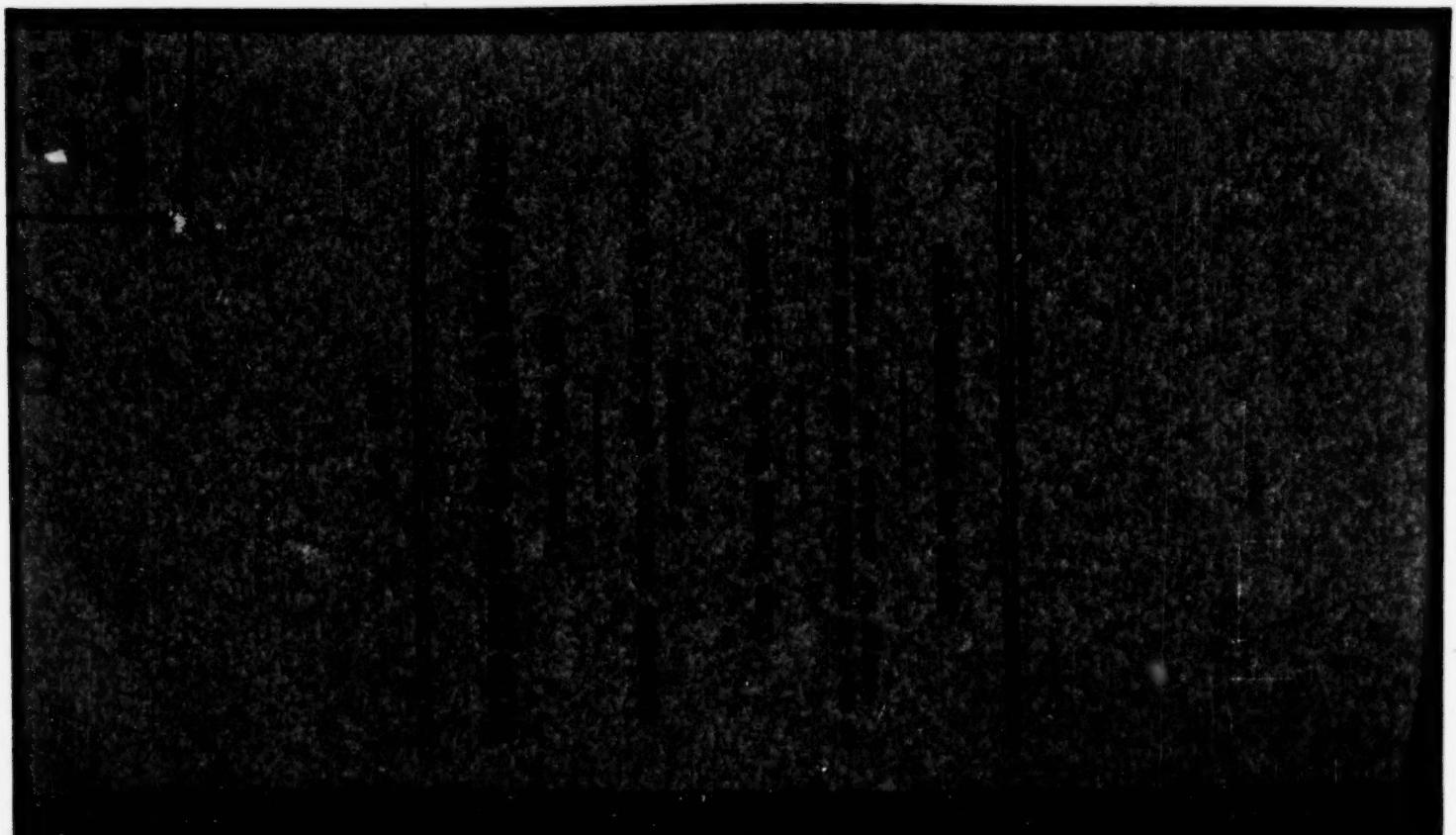
> "The damnable character of the "bootlogger's" business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. To press forward to a great principle by breaking through other great principles that stands in the way of its establishment. . . in short, to procure an eminent good by means that are unlawful, is as little consonant of private morality as to public justice."
>
> Sir William Scott, The Le Louis, 2 Dodson, Adm. 210, 257, 165 Eng. Reprint, 1464, 1479

Therefore petitioners pray that the conviction as to both defendants be set aside for the errors herein assigned.

E. B. WILCOX,

SALVADOR MESTRE,

Attorneys for Petitioners.



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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 195

AUGUSTIN SEGUROLA AND MANUEL SANTIAGO, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was filed by the District Court. The opinion of the Circuit Court of Appeals is reported in 16 F. (2d) 563. (R. 49.)

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered December 18, 1926. (R. 56.) Rehearing was denied January 26, 1927. (R. 56.) Petition for writ of certiorari was filed March 16, 1927; the writ was granted April 25, 1927 (R. 57), pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTIONS PRESENTED

1. Was it reversible error to refuse defendants' request for a free copy of the information?

2. Where a witness for the prosecution, to establish probable cause for search of an automobile without a warrant, testifies at the instance of the prosecution that he had information that the car was loaded with liquor, was it reversible error to refuse to allow cross-examination of the witness as to the name of his informant, and, in view of this restriction, was it reversible error to admit the liquor as evidence?

3. Was the evidence sufficient to sustain the conviction of the defendant Santiago?

STATEMENT

Petitioners were convicted under a criminal information filed in the District Court of the United States for Porto Rico, charging in the first count possession, and in the second count transportation, of intoxicating liquors in violation of the National Prohibition Act. (R. 3, 4.) The conviction on the possession count was set aside by the Circuit Court of Appeals, so only the second count is here involved. Upon arraignment petitioners waived a reading of the information and pleaded not guilty. Their counsel thereupon requested that they be furnished with a copy of the information free of charge. The request was denied by the court and an exception noted (R. 5, 25), the trial court stating that the

defendants and their counsel were free to examine the information and to make copies themselves, or have the Clerk make them on payment of his fee (R. 24).

At the trial Alfonso Ceballos, Chief of Police at Carolina, Porto Rico, testified for the prosecution that, having received a confidential telephone message that Segurola was driving a Buick automobile with a load of liquor from Luquillo to Loiza, he procured one Ismael Colon to drive him in a Ford car out to a point on the road where he awaited the appearance of the Buick machine; that when that car appeared he tried to intercept it by obstructing the road with the Ford, but Segurola operated his Buick so as to force the Ford aside, by threat of a collision (R. 14, 18), and went by at high speed; that the officer was in uniform, which Segurola must have observed (R. 19); that he followed in the Ford into Carolina, where, owing to obstacles encountered by the Buick, he managed to get around in front of it; that when Segurola saw his way blocked by the Ford he stopped the Buick, put it in reverse, and crashed into an electric post (R. 14); that Ceballos then arrested Segurola, as well as Santiago, who was sitting beside him, and that a search of the rear compartment of the Buick, which was a roadster, disclosed a number of sacks and bottles of whiskey, brandy, and gin (R. 15–19).

Upon cross-examination Ceballos was asked who gave him the information by telephone. Counsel

for the Government objected that "they are the secrets of the police force, which should not be stated in a court of justice, and the stating of the source of such information would be against public policy." The objection was sustained and an exception noted. (R. 15, 16.) Subsequently, when the liquor was offered and received in evidence (R. 23, 24), counsel for the defendants moved to "suppress the liquors as evidence," on the ground that the search was without a warrant, and did not appear to have been made upon probable cause because the seizing officer was not permitted to state the source of the telephone information which induced him to go out to look for the Buick car. The motion was overruled. No objection was ever made to the evidence of the officers and others that liquor was found in the car, and no evidence to dispute that fact was offered by the defense. At the close of the trial the jury found the defendants guilty as charged. (R. 5.) They were thereupon sentenced on the second, or transportation, count, Segurola to pay a fine of $300 and Santiago a fine of $200. (R. 7, 8.)

SUMMARY OF ARGUMENT

I. Under the Organic Act of Porto Rico the defendants were not entitled to have the Clerk of the Court furnish them free of charge a copy of the information. Their rights were satisfied by opportunity to hear it read, to make copies themselves, to examine it on file, or to have the Clerk furnish a copy on payment of his fee.

There is no reason to construe the Organic Act as entitling the accused to a free copy of the information when (prior to the Act of January 22, 1927) no such right existed in the Federal courts in continental United States.

II. The refusal to allow the prosecution's witness to be cross-examined about the name of an informer, and the refusal to suppress seized liquor as evidence, were not reversible errors.

The evidence for the prosecution that an officer received information of illegal transportation bore only on probable cause for seizure. We find some authority to support the ruling that the State's privilege as to the name of an informer may be asserted where the prosecution on direct examination brings out the fact that information was received, and the correct rule may be that even under such circumstances the name of the informer need not be disclosed unless really necessary to the investigation of the truth. There was evidence of probable cause without the evidence furnished by the informer.

The matter bore only on admissibility of evidence obtained by the search. All the testimony of witnesses as to finding the liquor in the car was received without an objection or motion to strike. The motion to suppress related only to the liquor as an exhibit, and if granted would have left undisputed evidence that liquor was illegally transported. On the record the failure to suppress the

corroborative exhibits, if error, was without prejudice.

III. The question whether there was sufficient evidence to sustain the conviction of Santiago is submitted on the decision below.

ARGUMENT

I

THE REFUSAL TO GRANT THE REQUEST FOR A FREE COPY OF THE INFORMATION WAS NOT ERROR

The defendants' request for a free copy of the information was based upon Section 2 of the Organic Act of Porto Rico (Act of March 2, 1917, c. 145, 39 Stat. 951; U. S. C., Title 48, Sec. 737), which provides:

> That in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense, to be informed of the nature and cause of the accusation, *to have a copy thereof*, to have a speedy and public trial, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor. (Italics ours.)

The request was denied by the District Judge (R. 5)—

> • • • for the reason that I know of no law requiring the same. The defendants and the attorney for the defendants are free at any time to examine the information, which is now in court, and to have copies thereof made at any time, as provided by law • • •.

Later at the trial, when the point was again raised by the defendants, the court said (R. 24):

> The objection is overruled for the reason that at the time that the defendants pleaded to the information, the information was in court and open to their inspection, and the defendants and their attorneys were informed by the court that they were at perfect liberty to examine said information in any way they desired or at perfect liberty to make copies thereof or to order the copies to be made and certified to by the clerk upon the payment of the fee as provided by law and the defendants and their attorneys have had every means of acquainting themselves with the contents of the information. The motion is overruled.

The provision in the Organic Act that the accused shall "enjoy the right * * * to have a copy" of the accusation does not mean that the copy must be furnished at the expense of the United States. Section 1033 of the Revised Statutes (U. S. C., Title 18, Sec. 562) provides:

> When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be

> delivered to him at least two entire days before the trial.

It has been held that as this statute applies to capital offenses only, it carries the inference that copies of indictments need not be furnished at Government expense in cases not capital. (*United States* v. *Van Duzee*, 140 U. S. 169.) In the same case it was indicated that the provisions of the Sixth Amendment, to the effect that—

> In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence,

imposed no general obligation on the part of the Government to furnish at its expense copies of indictments. If there was any obligation to furnish a free copy of the information to the accused in the present case, it was a statutory obligation and not a constitutional one, but a fair construction of the statute does not support the contention that a copy should have been furnished at the expense of the United States.

The provision of Section 2 of the Organic Act provides, in the language of the Sixth Amendment, that "the accused shall enjoy the right to have the assistance of counsel for his defense." That provision of the Constitution has never been construed to impose a general obligation on the Government

to furnish counsel at Government expense, and the like provision in Section 2 of the Organic Act has the same meaning and did not require that counsel be furnished at Government expense. The language of the Act respecting a copy of the accusation is identical. It is "the accused shall enjoy the right * * * to have a copy thereof." If the phrase first quoted does not mean that counsel must be furnished free, the latter phrase does not mean that a copy of the accusation shall be furnished free.

This construction is fortified by the fact that paragraph 6 of Section 8 of the Act of February 11, 1925 (c. 204, 43 Stat. 857, 858), relating to fees of clerks of the United States District Courts, and which is applicable to the United States District Court in Porto Rico, prior to its amendment on January 22, 1927, provided that clerks should receive "for a copy of any record, entry, or other paper, and the comparison thereof, 15 cents for each folio of one hundred words," and this has been uniformly construed to require the payment by the accused for a copy of any information or indictment except in capital cases covered by Section 1033, R. S., and that construction has received legislative recognition in the Act of January 22, 1927, c. 50, 44 Stat. 1022, 1023, amending paragraph 6 of Section 8 of the Act of February 11, 1925, relating to clerks' fees in United States District Courts, in which it is provided:

> 6. For a copy of any record, entry, or other paper, and the comparison thereof, 15 cents for each folio of one hundred words: *Provided,* That in each criminal case not provided for in section 1033 of the Revised Statutes of the United States the clerk shall furnish each defendant, upon his request, a copy of any information filed or indictment returned against him, the fees for said copy and the certificate thereto, at the rates provided for by law, to be taxed as costs; but such fees shall not be demanded of any such defendant unless and until by order, judgment, or decree of the court the costs in the case are assessed against him.

This Act applies to the United States District Court in Porto Rico, and since its passage it has been the law in Porto Rico that the accused in any criminal case is entitled upon request to receive a copy of the information or indictment without payment of fees, unless in the form of costs taxed against him after conviction.

The provisions of Section 2 of the Organic Act of Porto Rico, giving the accused the right to have a copy of the accusation, should not be construed to impliedly repeal the provision fixing fees of the clerks of the United States District Courts. It certainly was not intended to give the accused in Porto Rico, in cases not capital, greater consideration than was granted generally to those arraigned in District Courts in the continental United States.

In the case of *Logan* v. *United States*, 144 U. S. 263, the Court held that the failure to deliver a copy of the indictment as specified in Section 1033, R. S., was reversible error. We assume that if the Organic Act of Porto Rico required that a copy of the information must be delivered to the accused at the expense of the United States at least three days before the trial, the failure to comply with the statute would be reversible error, but the provision in the Organic Act that the accused should enjoy the right to have a copy should not be construed to compel its delivery at Government expense. It merely meant that the accused should have the right to make a copy or to obtain one on payment of the fees provided by the other statute relating to clerk's fees above referred to.

It is quite evident that there was no actual prejudice through failure to furnish a copy at Government expense. The information was brief and could have been copied by a scrivener in five or ten minutes, and was on file, open to inspection, all through the proceedings. The request for a copy at Government expense was obviously made not for the purpose of protecting any substantial right but to lay a technical foundation for reversal in the event of conviction. There is no suggestion that the accused was indigent or unable to pay the clerk's fee of 15 cents a folio (about 75¢) for the document requested.

II

THE REFUSAL TO ALLOW THE PROSECUTION'S WITNESS TO BE CROSS-EXAMINED AS TO THE NAME OF AN INFORMER AND THE REFUSAL TO SUPPRESS THE LIQUOR AS EVIDENCE WERE NOT REVERSIBLE ERRORS

The Chief of Police testified for the prosecution, on direct examination, that he had gone to look for Segurola in consequence of a confidential telephone communication that the latter was approaching with a load of liquor in a Buick car. This evidence, received without objection, was material only in establishing probable cause for the search of the automobile without a warrant. The refusal of the court to allow the defense on cross-examination to ask the name of the informer was based on the ground that the matter was privileged. It is well settled that the identity of an informer is a privileged matter and may not be disclosed without the consent of the State. The question of this privilege usually arises in civil cases between private persons, such as suits for malicious prosecution, where a public official is called as a witness by one of the parties, and it has sometimes arisen in criminal prosecutions where the prosecution has not opened the subject in examining its own witnesses.

Ordinarily, in a criminal prosecution, the fact that an official has been informed of the guilt of the accused is not competent or material, and it would be most unusual for the prosecution to open the doors to an inquiry on that subject by its method of examining its own witnesses.

The unusual feature of this case lies in the fact that here the prosecution, in direct examination of one of its witnesses, drew out the fact, which was material on the question of the validity of the search, that the witness had been informed that the offense was being committed. The question here is not whether such a privilege exists, but whether the prosecution, by opening the subject in direct examination of its witness, waived the privilege, and whether the rule goes to the extent of excluding the defense from cross-examining as to the identity of the informer where the fact of the information is material and has been covered by direct examination of a witness for the prosecution. We have been able to find little satisfactory authority on the point. The subject of the privilege is dealt with in Wigmore on Evidence, 2d Ed., 1923, vol. 5, Section 2374, where a large number of cases are collated. See *Worthington* v. *Scribner*, 109 Mass. 487; *Vogel* v. *Gruaz*, 110 U. S. 311; *In re Quarles* and *Butler*, 158 U. S. 532; *Marks* v. *Beyfus*, L. R. 1890, 25 Q. B. D. 494; *Humphrey* v. *Archibald*, 20 Ontario App. 267; *Regina* v. *Richardson*, 3 Foster and Finlayson, N. P. cases, 693; *Attorney General* v. *Briant*, 15 M. & W. 169; *Elrod* v. *Moss*, 278 Fed. 123, 127; *Arnstein* v. *United States*, 296 Fed. 946, 950.

One American decision has been found where it appears the prosecution went into the matter on direct examination of its witnesses. *People* v. *Laird*, 102 Mich. 135.

In *Mitrovich* v. *United States*, 15 F. (2d) 163, a criminal prosecution for maintaining a common nuisance, it is stated that a Government witness testified the place was pointed out to him by an informer, and the opinion said:

> He was then asked the name of the informer, but an objection to the question was sustained and an exception allowed.

The opinion in that case does not show that the testimony given by the Government witness that information had been given by an informer was brought out by the prosecution.

In some English cases there is a suggestion that, although the fact of receiving information may have been brought out by the prosecution, the identity of the informer may not be disclosed in cases where the disclosure of the name is not really necessary to the investigation of the truth.

In the present case the existence of probable cause for search was material, since on it depended the admissibility of all the evidence showing the transportation of liquor, and the question is whether under such circumstances the rule as to the privilege in question goes to the extent of allowing the prosecution to bring out the fact that information was given without opening the door to cross-examination as to the name of the informer.

If, as suggested in the English cases, the identity of the informer need not be disclosed unless really necessary to the investigation of the truth of the

charge, then this is a proper case to apply that principle.

In the trial of Thomas Hardy for high treason, 24 State Trials 199 (1794), Lord Chief Justice Eyre stated (p. 808):

> It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed. If it can be made appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it, but it does not appear to me that it is within the ordinary course to do it, or that there is any necessity for it in this particular case; all that this witness says is, I did this upon advice; I did from time to time communicate with a friend for the purpose of its being communicated to a magistrate, and in that manner it was that I came to know these transactions.

In the later case of *Marks* v. *Beyfus*, L. R. 1890, 25 Q. B. D. 494, Lord Esher announciated the same principle (p. 498):

> "*The rule clearly established and acted on is this, that in a public prosecution a witness*

can not be asked such questions as will disclose the informer, if he be a third person * * * and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer." Now, this rule as to public prosecutions was founded on grounds of public policy, and if this prosecution was a public prosecution the rule attaches; I think it was a public prosecution, and that the rule applies. I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail. But except in that case, this rule of public policy is not a matter of discretion; it is a rule of law, and as such should be applied by the judge at the trial, who should not treat it as a matter of discretion whether he should tell the witness to answer or not. The learned judge was, therefore, perfectly right in the present case in applying the law, and in declining to let the witness answer the questions. The result of his so deciding was, of course, that the plaintiff's cause of action, which was founded on the alleged instigation of the Director of Public Prosecutions by the defendants, failed, for there was no evidence of any such instigation. (Italics ours.)

As the question of the identity of the informer in the case at bar bore only on probable cause and not directly on guilt or innocence, the court, if it had discretion to exclude the name of the informer, wisely exercised it. Under all the circumstances of this case the inquiry as to the identity of the informer could have served no purpose other than to expose him.

It may not be necessary in this case to decide this question, and even if it were resolved against the United States the conviction should stand. The evidence as to the fact that information was given was material only as bearing on the existence of probable cause for search of the automobile, a matter to be decided by the court in ruling on objections to the admission of evidence resulting from the search. There was some evidence to establish probable cause aside from the information given by the informer. See *Carroll* v. *United States*, 267 U. S. 132.

The conduct of Segurola when the officer in uniform endeavored to stop his car in the first instance, his efforts to escape, and the other circumstances were enough to justify any reasonable man in concluding he was engaged in some unlawful enterprise.

Furthermore, the attempted cross-examination as to the name of the informer only dealt with the matter of probable cause and with the basis for the admissibility of the evidence resulting from the

search. All the testimony as to the fact of search *and the finding of* liquor in the car was offered and received without any objection from the defense. Only the admission of the liquor as an exhibit was assailed, and that by motion "to suppress the liquor as evidence" first made after it was received. If the motion had been granted, there still remained in the record—offered and received without objection—all of the testimony showing the discovery of the liquor in the car, of which the liquor itself was merely corroborative. No evidence was offered by the defense to contradict the proof that liquor was transported and found in the car. Under these circumstances, if error was made in restricting the cross-examination and in not granting the motion to suppress the liquor as an exhibit, it was error without substantial prejudice.

III

IS THE EVIDENCE SUFFICIENT TO SUSTAIN THE CONVICTION AS TO DEFENDANT SANTIAGO?

The defendant Santiago's motion for a new trial was denied by the trial court. The Circuit Court of Appeals affirmed his conviction under the second count, that of transportation. Due weight should be given the conclusion reached as to Santiago by the courts below.

Defendant Santiago accompanied Segurola on the journey from Luquillo to Carolina. He sat in the front seat with Segurola when the latter passed

and escaped the police officer on the road outside Carolina. He was with Segurola in the town of Carolina when Segurola, in an attempt to back away and escape from Ceballos, collided with an electric-light post. Defendants were arrested at the same time, and Santiago was present when the search and seizure occurred. (R. 14, 15, 17, 27, 28.)

Santiago testified that, being in Fajardo (R. 26), which is not his home, he accepted an invitation to ride to San Juan in Segurola's car. He said that he had no knowledge of the presence of liquor in the car. (R. 25.) In fact, he testified that he did not know that the police found liquor in the car; he did not even see the car being searched; he first learned of the seizure at police headquarters after the arrest. (R. 27.) This testimony is flatly refuted by the witnesses Alvarez and Ceballos. (R. 17, 28.)

The direct evidence against Santiago was slight, and while such evidence may not constitute proof of guilt, and the man might have been an innocent passenger, yet this evidence taken in conjunction with the fact of false testimony was held below to constitute sufficient evidence to justify the court in permitting the jury to pass upon his guilt or innocence. The conduct of defendant in falsely testifying is in the nature of an admission of guilt, and a jury may properly conclude from such action that a defendant is guilty. *Wilson* v. *United States*,

162 U. S. 613, 620–621; *Wigmore on Evidence*, 2nd Ed., vol. 1, Sec. 278, p. 566.

Moreover, the question of the sufficiency of the evidence as to Santiago was first raised on motion for a new trial. (R. 5, 7.) Since that motion is directed to the sound discretion of the trial court, the denial is not usually subject to review. *Holmgren* v. *United States*, 217 U. S. 509, 521.

The case against Santiago is meagre, and we do not feel justified in making a very vigorous attack on the contention that it is insufficient, or do more than submit this part of the case on the reasoning of the courts below.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

WILLIAM J. DONOVAN,
Assistant to the Attorney General.

BETHUEL M. WEBSTER, JR.,
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Special Assistants to the Attorney General.

SEPTEMBER, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 980

AUGUSTIN SEGUROLA AND MANUEL SANTIAGO, petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 57) is reported in 16 F. (2d) 563.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered December 18, 1926, and rehearing was denied January 26, 1927. (R. 71.) The petition for a writ of certiorari was filed March 16, 1927.

Jurisdiction to issue the writ applied for is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938.

STATEMENT

Petitioners were named as defendants in a criminal information filed in the District Court of the United States for Porto Rico, charging in the first count possession, and in the second count transportation, of intoxicating liquors in violation of the National Prohibition Act. (R. 3, 4.) Upon arraignment they waived a reading of the information and pleaded not guilty. Their counsel thereupon requested that they be furnished with a copy of the information free of charge. The request was denied by the court and an exception noted. (R. 5, 44.)

At the trial, Alfonso Ceballos, Chief of Police at Carolina, Porto Rico, testified for the prosecution that, having received a confidential telephone message that Segurola was driving a Buick automobile with a load of liquor from Luquillo to Loiza, he procured one Ismael Colon to drive him in a Ford car out to a point on the road where he awaited the appearance of the Buick machine; that when that car appeared he tried to intercept it but it went by at high speed; that he followed in the Ford into Carolina, where, owing to obstacles encountered by the Buick, he managed to get around in front of it;

that when Segurola saw his way blocked by the Ford he stopped the Buick, put it in reverse, and crashed into an electric post; that Ceballos then went forward and arrested Segurola, as well as Santiago, who was sitting beside him, and that a search of the rear compartment of the Buick, which was a roadster, disclosed a number of sacks and bottles of whiskey, brandy, and gin. (R. 37, 38.)

Upon cross-examination Ceballos was asked who gave him the information by telephone. Counsel for the Government objected that "they are the secrets of the police force, which should not be stated in a court of justice, and the stating of the source of such information would be against public policy." The objection was sustained and an exception noted. (R. 39.) Subsequently counsel for the defendants moved to suppress the evidence relating to the liquors and their seizure, on the grounds that the search was without a warrant and did not appear to have been made upon probable cause, for the reason that the seizing officer was not permitted to state the source of the telephone information which induced him to go out to look for the Buick car. The motion was overruled. (R. 43, 44.) At the close of the trial the jury found the defendants guilty as charged. (R. 5.) They were thereupon sentenced, on the first or possession count, Segurola to pay a fine of $200 and Santiago a fine of $100, and on the second or transportation count, Segurola to pay a fine of $300 and Santiago a fine

of $200. (R. 7, 8.) Upon writ of error the Circuit Court of Appeals reversed as to the first count, on the ground that the possession was merely incidental to the transportation, but affirmed as to the second count. (R. 62, 71.) A petition for rehearing was thereafter denied. (R. 71.) Petitioners now ask this Court to grant a writ of certiorari upon the following grounds:

> 1. That it was reversible error to refuse the petitioners' request for a free copy of the information.
>
> 2. That in sustaining the objection to the cross-examination regarding the source of the telephone information the courts below erred, because (a) the telephone conversation was not privileged, and (b) if it was, the privilege was waived.
>
> 3. That the evidence failed to show probable cause for the search.
>
> 4. That the evidence was insufficient to justify the conviction of the petitioner Santiago.

ARGUMENT

I

THE REFUSAL TO GRANT THE REQUEST FOR A FREE COPY OF THE INFORMATION WAS NOT ERROR

The defendants' request for a free copy of the information was based upon Section 2 of the Organic Act of Porto Rico (Act of March 2, 1917, c. 145, 39 Stat. 951), which provides:

> That in all criminal prosecutions the accused shall enjoy the right to have the

> assistance of counsel for his defense, to be informed of the nature and cause of the accusation, *to have a copy thereof,* to have a speedy and public trial, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor. (Italics ours.)

The request was denied by the District Judge (R. 5)—

> * * * for the reason that I know of no law requiring the same. The defendants and the attorney for the defendants are free at any time to examine the information, which is now in court, and to have copies thereof made at any time, as provided by law * * *.

Later at the trial, when the point was again raised by the defendants, the court said (R. 44):

> The objection is overruled for the reason that at the time that the defendants plead to the information, the information was in court and open to their inspection, and the defendants and their attorneys were informed by the court that they were at perfect liberty to examine said information in any way they desired or at perfect liberty to make copies thereof or to order the copies to be made and certified to by the clerk upon the payment of the fee as provided by law and the defendants and their attorneys have had every means of acquainting themselves with the contents of the information. The motion is overruled.

The provision in the Organic Act that the accused shall "enjoy the right * * * to have a copy" of the accusation does not mean that the copy must be furnished at the expense of the United States. Section 1033 of the Revised Statutes provides:

> When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial.

It has been held that as this statute applies to capital offenses only, it carries the inference that copies of indictments need not be furnished at Government expense in cases not capital. (*United States* v. *Van Duzee*, 140 U. S. 169.) In the same case it was indicated that the provisions of the Sixth Amendment, to the effect that—

> In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence,

imposed no general obligation on the part of the Government to furnish at its expense copies of indictments. If there was any obligation to furnish a free copy of the information to the accused in the present case, it was a statutory obligation and not a constitutional one, but a fair construction of the statute does not support the contention that a copy should have been furnished at the expense of the United States.

The provision of Section 2 of the Organic Act provides, in the language of the Sixth Amendment, that "the accused shall enjoy the right to have the assistance of counsel for his defense." That provision of the Constitution has never been construed to impose a general obligation on the Government to furnish counsel at Government expense, and the like provision in Section 2 of the Organic Act has the same meaning and did not require that counsel be furnished at Government expense. The language respecting a copy of the accusation is identical. It is "the accused shall enjoy the right * * * to have a copy thereof." If the phrase first quoted does not mean that counsel must be furnished free, the latter phrase does not mean that a copy of the accusation shall be furnished free.

This construction is fortified by the fact that paragraph 6 of Section 8 of the Act of February 11, 1925 (c. 204, 43 Stat. 857, 858), relating to fees of clerks of the United States District Courts, and which is applicable to the United States District Court in Porto Rico, prior to its amendment on

January 22, 1927, provided that clerks should receive "for a copy of any record, entry, or other paper, and the comparison thereof, 15 cents for each folio of one hundred words," and this has been uniformly construed to require the payment by the accused for a copy of any information or indictment except in capital cases covered by Sec. 1033, R. S., and that construction has received legislative recognition in the amendment of January 22, 1927, hereafter mentioned.

The provisions of Section 2 of the Organic Act of Porto Rico, giving the accused the right to have a copy of the accusation, should not be construed to impliedly repeal the provision fixing fees of the clerks of the United States District Courts. It certainly was not intended to give the accused in Porto Rico, in cases not capital, greater consideration than was granted generally to those arraigned in District Courts in the continental United States.

In the case of *Logan* v. *United States*, 144 U. S. 263, [redacted], the Court held that the failure to deliver a copy of the indictment as specified in Sec. 1033, R. S., was reversible error. We assume that if the Organic Act of Porto Rico required that a copy of the information must be delivered to the accused at the expense of the United States at least three days before the trial, the failure to comply with the statute would be reversible error, but the provision in the Organic Act that the accused should enjoy the right to have a copy should not be construed to

compel its delivery at Government expense. It merely meant that the accused should have the right to make a copy or to obtain one on payment of the fees provided by the other statute relating to clerk's fees above referred to.

It is quite evident that there was no actual prejudice through failure to furnish a copy at Government expense. The information was brief and could have been copied by a scrivener in five or ten minutes, and was on file, open to inspection, all through the proceedings. The request for a copy at Government expense was obviously made not for the purpose of protecting any substantial right but to lay a technical foundation for reversal in the event of conviction. There is no suggestion that the accused was indigent or unable to pay the clerk's fee of 15 cents a folio (about 75¢) for the document requested.

The point is of no consequence for the future, because by Public Act No. 563, approved January 22, 1927, amending paragraph 6 of Section 8 of the Act of February 11, 1925, relating to clerk's fees in United States District Courts, it is provided:

> 6. For a copy of any record, entry, or other paper, and the comparison thereof, 15 cents for each folio of one hundred words: *Provided*, That in each criminal case not provided for in section 1033 of the Revised Statutes of the United States the clerk shall furnish each defendant, upon his request, a copy of any information filed or indictment

> returned against him, the fees for said copy and the certificate thereto, at the rates provided for by law, to be taxed as costs; but such fees shall not be demanded of any such defendant unless and until by order, judgment, or decree of the court the costs in the case are assessed against him.

This Act applies to the United States District Court in Porto Rico, and since its passage it has been the law in Porto Rico that the accused in any criminal case is entitled upon request to receive a copy of the information or indictment without payment of fees, unless in the form of costs taxed against him after conviction.

II

THE CROSS-EXAMINATION AS TO THE SOURCE OF THE TELEPHONE INFORMATION WAS PROPERLY EXCLUDED

Chief of Police Ceballos having testified for the Government on direct examination that he had gone out to look for Segurola in consequence of a confidential telephone communication that the latter was approaching with a load of liquor in a Buick car, was asked on cross-examination who had given him that information. Objection by the Government to this question, on the ground that the source of the information was confidential and should not be divulged, was sustained by the District Court. Petitioners assert that this was erro-

neous, first, because the information was not privileged, and, second, because the privilege was waived by the Government's permitting Ceballos to testify that he had received such message.

As a general rule, identity of persons giving information to officers of the law of actual or supposed law violation is a privileged matter, which is not to be disclosed. (*In re Quarles and Butler*, 158 U. S. 532.) Here it is suggested that the privilege did not exist because the witness for the United States, on direct examination, had stated that he had received a confidential telephone communication, and the accused was entitled to cross-examine him respecting that statement. The fact of the confidential telephone communication was not material in this case except as bearing on the existence of probable cause for the search of the automobile, which, in turn, bore only on the admissibility of the evidence derived from the search.

There was ample evidence of probable cause justifying the search without the confidential telephone communication. The record (pp. 23; 24) discloses that Ceballos, the officer, was in uniform and in full view of Segurola as the latter approached in his car, and that Segurola tried to run him down, and went by at high speed, and that thereafter, when Ceballos again managed to get in front of him in the public square in Carolina, Segurola was so anxious to get away that he backed his machine

into a post. The circumstances, independent of the telephone communication, were ample to warrant a man of reasonable caution in believing that Segurola was engaged in an unlawful enterprise. Furthermore, all the evidence derived from the search was admitted, so far as this record discloses, without objection. There is nothing to show that the testimony of the officers respecting the finding of the liquor in the car was objected to. The petitioners moved only to "suppress the liquors." (R. 29.) The liquor introduced was merely corroborative evidence, and as there is disclosed no dispute that contraband liquor was actually found in the car when searched, and no objection to the other evidence establishing that fact, the point is of no consequence in any way.

III

THE CONVICTION OF SANTIAGO

The final ground urged for the allowance of certiorari is that the evidence was insufficient to justify the conviction of the petitioner Santiago. Taking the stand in his own behalf, Santiago testified that he was riding in Segurola's car merely as a passenger; that he had met Segurola, whom he had known for about five years, in Fajardo, and learning that Segurola was about to go to San Juan had asked him to take the witness along; that he did not see the car being opened and did not know

whether the police found any liquor in it, and that he was not informed of the reason for his arrest until after he had been taken to police headquarters. (R. 31–34.) Chief of Police Ceballos, called in rebuttal, testified that at the time of the arrest Segurola and Santiago got out of the Buick car at his command; that the witness told Santiago that he had arrested him because he was transporting liquor, and that "Santiago was there and saw everything that happened." (R. 34.) Aside from this conflict between the testimony of Santiago and that of the Government's witness Ceballos, the District Court was clearly justified in allowing the jury to determine, from the appearance of that defendant on the stand and from the circumstances of the case, whether his story that he was merely a passenger was worthy of belief.

Furthermore, so far as the record shows, there was no motion for a directed verdict. The question of the sufficiency of the evidence as to Santiago was raised for the first time upon motion for a new trial (R. 5–7), the denial of which was not subject to review. (*Holmgren* v. *United States*, 217 U. S. 509, 521.)

CONCLUSION

The points presented are without any substantial merit; the convictions sustained by the Circuit Court of Appeals involve only petty fines; the actual guilt of one of the petitioners does not seem to be questioned, and the question of the guilt of

the other was a fair question for the jury; the case is not one justifying consideration of this Court, and the petition for certiorari should be denied.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

JOHN J. BYRNE,
Attorney.

APRIL, 1927.

SUPREME COURT OF THE UNITED STATES.

No. 195.—October Term, 1927.

Augustin Segurola and Manuel Santiago, Petitioners, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[November 21, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This is a review of a sentence against the petitioners upon a criminal information, filed in the District Court of the United States for Porto Rico, charging in the first count possession, and in the second count transportation, of intoxicating liquors in violation of the National Prohibition Act. The conviction on the possession count was set aside by the Circuit Court of Appeals, so that only the second count is here involved. Upon arraignment, petitioners waived a reading of the information and pleaded not guilty. Their counsel thereupon requested that they be furnished with a copy of the information free of charge. The request was denied by the court and an exception noted, the trial court stating that the defendants and their counsel were free to examine the information and to make copies themselves, or have the clerk make them on payment of his fee.

At the trial, Alfonso Ceballos, Chief of Police at Carolina, Porto Rico, testified for the prosecution that, having received a confidential telephone message that Segurola was driving a Buick automobile with a load of liquor from Luquillo to Loiza, he procured one Ismael Colon to drive him in a Ford car out to a point on the road where he awaited the appearance of the Buick machine; that when that car appeared he tried to intercept it by obstructing the road with the Ford, but Segurola operated his Buick so as to force the Ford aside, by threat of a collision, and went by at high speed; that the officer was in uniform, which Segurola must have

observed; that he followed in the Ford into Carolina, where, owing to obstacles encountered by the Buick, he managed to get around in front of it and when Segurola saw his way blocked by the Ford, he stopped the Buick, put it in reverse, and crashed into an electric wire post; that Ceballos then arrested Segurola, as well as Santiago, who was sitting beside him, and that a search by Ceballos of the rear compartment of the Buick, which was a roadster, disclosed a number of sacks containing bottles of whiskey, brandy, and gin.

In the cross-examination, Ceballos was asked who gave him the information by telephone. Counsel for the Government objected that "they are the secrets of the police force, which should not be stated in a court of justice, and the stating of the source of such information would be against public policy". The objection was sustained and an exception noted. Evidence was given of the alcoholic content of the liquor and the identity of that examined with that seized. When the liquor was offered and received in evidence, it was objected to on the ground that it had not been properly identified, but the objection was overruled and the liquor admitted. Thereafter, counsel for the defendants moved to suppress the liquor, as evidence, on the ground that the search was without a warrant and did not appear to have been made upon probable cause, and also, for the reason that upon the issue of probable cause defendants were not permitted to cross-examine the seizing officer as to the person from whom he received by telephone the information which induced him to go to look for the Buick car. The motion was overruled. No objection was ever made to the evidence of the officers and others that liquor was found in the car and no evidence to dispute these facts was offered by the defense. At the close of the trial the jury found the defendants guilty as charged and the Court sentenced them to pay fines.

The case was carried upon writ of error to the Circuit Court of Appeals for the First Circuit. 16 Fed. (2d) 563. That Court affirmed the judgment, holding that the refusal to furnish a copy of the information without payment of a fee to the clerk was right and, even if erroneous, was, under the circumstances, a harmless error; that the refusal to permit cross-examination of the officer as to his informant in respect to the coming of Segurola and the con-

tents of his car was in accord with approved public policy and that the circumstances constituted probable cause for a legal seizure.

The error assigned to the failure to direct the delivery of a copy of the information rests on the second section of the Organic Act of Porto Rico,—Act of March 2, 1917, c. 145, 39 Stat. 951, U. S. C., Title 48, § 737, in which it is provided that "in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense, to be informed of the nature and cause of the accusation, to have a copy thereof, to have a speedy and public trial, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor". The district judge held that this did not mean that the defendant was to have a copy of the information without paying the regular copying fees to the clerk. We think this was an erroneous construction of the statute. It was enacted by Congress to apply in a country where there were two languages, and in which a criminal procedure, new in some of its aspects, was to be put into effect. It was not strange, therefore, that it was thought necessary *ex industria* to emphasize the means by which the accused could be advised of the charge made against him. These circumstances make the case of *United States* v. *VanDuzee*, 140 U. S. 169, 172, relied on by the Circuit Court of Appeals, inapplicable. The words do not appear in the analogous provisions of the guaranty of the rights of the accused in our Constitution. They should be given some real effect and the opportunity thus conferred to read the charge upon which the accused is brought into court should not be obstructed by the necessity for paying fees for its enjoyment. We think, therefore, that the court was wrong in not directing that a copy be furnished to each defendant. But that is very different from saying that because of the failure of the court to issue this order, the trial which ensued should be held for naught and a new trial had. As a matter of fact, the petitioners, when attended by counsel, waived a reading of the information and pleaded not guilty, which was an indication that they already knew what the information was and that they really suffered no prejudice which would justify a new trial. We agree with the Circuit Court of Appeals in its conclusion that in any view the error was a harmless one.

The questions which have been chiefly argued here are, first, the correctness of the refusal of the court to allow the police officer

to be cross-examined as to the name of the person who communicated to him the information that the defendants were engaged in transporting liquor in a Buick car; and, second, the question of the existence of probable cause to justify the seizure of the automobile under the circumstances shown.

We think that these two questions do not arise, and that the judgment should be affirmed, without regard to the proper answer to them. The results of the search and seizure were shown by the testimony of the chief of police and of the other witnesses without any objection on behalf of the defendants; and thus was disclosed the fact that the defendants had been engaged in transporting a large amount of liquor in the Buick. No motion was made to strike that evidence out, and no evidence was introduced to contradict what was disclosed by the statements of the chief of police and other witnesses upon this point. The only objection made toward the close of the evidence for the Government was that, when it was proposed to introduce the liquor, it had not been properly identified, but there was ample evidence to show that it had. The motion made thereafter to suppress the liquor as evidence, on the ground that there had been an illegal search, did not include a motion to strike out the evidence of the witnesses as to what occurred when the car was stopped. The objection to the seizure was plainly an after thought.

As there was no evidence introduced by the defendants to refute or deny the testimony unobjected to, which clearly showed the illegal transportation of the liquor and sustained the verdict, the admission in evidence of the liquor and the refusal to permit cross-examination of Ceballos worked no prejudice for which a reversal can be granted. Moreover, the principle laid down by this Court in *Adams* v. *New York*, 192 U. S. 585, and recognized as proper in *Weeks* v. *United States*, 232 U. S. 383, 395, and in *Marron* v. *United States*, No. 185, October Term, 1927, decided this day, applies to render unavailing, under the circumstances of this case, the objection to the use of the liquor as evidence based on the Fourth Amendment. This principle is that, except where there has been no opportunity to present the matter in advance of trial, *Gouled* v. *United States*, 255 U. S. 298, 305; *Amos* v. *United States*, 255 U. S. 313, 316; *Agnello* v. *United States*, 269 U. S. 20, 34, a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of

papers or other articles of personal property, which are material and properly offered in evidence, because the court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation and which is wholly independent of it. In other words, in order to raise the question of illegal seizure, and an absence of probable cause in that seizure, the defendants should have moved to have the whiskey and other liquor returned to them as their property and as not subject to seizure or use as evidence. To preserve their rights under the Fourth Amendment, they must at least have seasonably objected to the production of the liquor in court. This they did not do, but waited until the liquor had been offered and admitted and then for the first time raised the question of legality of seizure and probable cause as a ground for withdrawing the liquor from consideration of the jury. This was too late.

On behalf of Santiago, the companion of Segurola in the Buick, it is urged that there was no evidence to justify his conviction and that his is a case of poor dog Tray. He accompanied Segurola from Luquillo to Carolina and in the race of cars which occurred on that trip. There were 188 bottles of liquor lying loose in eleven sacks in a box back of the seat under him in the Buick. He could hardly have been unconscious of their presence. The seizing officer said that Santiago was present and saw the liquor as seized. But Santiago testified that he didn't see the liquor and did not know why he and his companion were being taken to the station. In view of the jar of the collision of the Buick with the electric wire post and the exciting race between the cars and the contradicting evidence of the government witnesses, the jury evidently thought that Santiago protested too much and had destroyed his credibility. We can not say that there was no evidence to sustain their verdict.

The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.